Defending Digitalisation: The Case for Platform-Specific Legislation in the UK

COLE, WILLIAM,JOHN

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Author:	William John Cole
Qualification:	Master of Jurisprudence
Department:	Law
Institution:	Durham University
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INTRODUCTION

The rise of new technologies has changed the world of work, and the 21st century labour market is one in which new methods of work are emerging all the time.[1] Platform work is one such method.

Platform work revolves around the use of applications to provide services to customers. Any person with access to the internet can find a platform which caters to their needs. Whether you need a taxi, want to order a takeaway, or even need someone to carry out some DIY, platforms are available to find someone who can help. In the UK, arguably the best-known platform is Uber – which is used as a ride-hailing app to find taxi services, and as a food delivery service[2]. This is a rapidly growing platform, with over 6.3 billion rides being completed by over 5 million Uber drivers worldwide in 2021.[3] As technology speeds on and the labour market grows with it – the legal tests applying to that work are left behind. In particular, the focus of this thesis is on the legal classification of platform workers.

A platform worker is easily identifiable. They are the person who provides the service demanded by the user of the platform – your Uber driver, for example. What is less easy to identify, however, is the scope of labour law protections which apply to platform workers. Access to labour law rights is dependent on the individual's protected status – as either an employee with access to a full plethora of labour rights, a worker who is entitled to a basic package of rights[4], or independent contractor (also referred to as being self-employed) who benefits from no labour law protection.

[1] Katherine V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (1st edition, Cambridge University Press 2004).
[2] Uber Eats now operates from the same mobile application as Uber's ride-hailing service.
[3] According to Uber's figures. See, Mansoor Iqbal, 'Uber Revenue and Usage Statistics (2022)' (Business of Apps, February 2022) < https://www.businessofapps.com/data/uber-statistics/> accessed February 2022.
[4] For example, those set out in the National Minimum Wage Act 1998 (NMWA 1998) ;Working Time Regulations 1998, SI 1998/1833 (WTR 1998).

However, platform workers are stuck in a no-mans-land between classification as independent contractors and having worker status. The result for platform workers is that they cannot be sure of their labour rights.

This thesis makes the case for the introduction of platform-specific legislation, arguing that this is the only means through which we can clarify the protected status of platform workers, to help them find their way across this no-mans-land. Each of the four Chapters will take a step towards finding the most effective means through which we can clarify their protected status.

The first Chapter will serve as a necessary introduction to the nature of platform work and why it does not sit neatly into any of the three categories of protected status. It will be shown that there is a disparity between the reality of the work done in many cases, and the content of the contract dictated by the platforms. Whilst the former appears indicative of worker status, the latter attempts to classify platform workers as independent contractors. Ultimately, the category into which platform workers fall is unclear, and must be addressed in order to clarify protected status.

Chapter 2 then begins to make the case for the platform-specific legislation. This Chapter addresses claims that the Supreme Court in *Uber*[5] has provided an application of the tests to determine protected status, that has brought clarity and thus removes the need to legislate.[6] It will be shown that, although the decision is a welcome one for the protection of platform workers, it does not clarify their protected status. One of the many issues which remains, is the lack of clarity with regards to Court's statutory purposive approach to the decision.[7]

After having shown that the judiciary in *Uber* did not successfully clarify the protected status of platform workers, discussion turns to whether the current tests would allow the judiciary to ever bring such clarity. Chapter 3 shows that the current tripartite test to determine

[5] *Uber BV v Aslam* [2021] UKSC 5.
[6] Joe Atkinson and Hitesh Dhorajiwala, 'The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber*' (2021) 0(0) MLR 1.
[7] Zoe Adams, 'One step Forward for Employment Status, Still Some way to Go: The Supreme Court's Decision in *Uber v* Aslam Under Scrutiny' (2021) 80(2) Cambridge Law Journal 221.

protected status, requiring mutuality, personal service and control, is completely unsuited to platform work and is the source of much of the confusion surrounding protected status. Given that these tests have been drawn from the wording of the statutory definition of worker[8], it is clear that only new legislation can provide a set of tests capable of clarifying the protected status of platform workers.

Finally, we look to the form such legislation would take. This discussion is novel and timely in nature. This piece will be the first to look at both California's Assembly Bill Number 5[9], and the European Union's recent proposal for a Directive on improving working conditions in platform work[10], in order to suggest the format of new legislation which would specifically clarify the protected status of platform workers. Ultimately, it will be suggested that a legislative test combining elements of both, should be adopted – along with codification of some elements of the Supreme Court's decision in *Uber.*

CHAPTER 1: THE PLATFORM WORK PLIGHT – THE NEED TO CLARIFY PROTECTED STATUS

1.1 Introduction

The aim of this thesis is to make the case for new platform-specific legislation to be introduced which clarifies the protected status of platform workers.

This chapter will serve as an introduction to platform work and the issues facing platform workers. In particular, how their protected status is unclear when the current framework to determine such status is applied. It will be demonstrated that they fall into a no-mans-land between worker and independent contractor status. The effects of this on platform workers will then be discussed, highlighting the need for further clarity as to the classification of such

[8] For example, Employment Rights Act 1996, s230(3).
[9] Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020).
[10] European Commission Directive Proposal 2021/0414 (COD) on improving working conditions in platform work (2021).

workers. Before we can analyse how it fits into the current tests, we must first understand the nature of platform work.

1.2 What is Platform Work? Definition and Characteristics

Before we begin to determine the nature of platform work, there is an important distinction to be made for the scope of this piece, between two forms of platform work.

1.2.1 Virtual Vs Offline Platform Work

Platform work exists in two forms. Scholarly definitions of platform work begin to show the difference between the two. Cherry described platform work as 'aided by cellphone applications (apps) or websites, and they rely on technology to deploy workers to perform tasks'.[11] However, she also describes platform work as 'computer based work performed wholly in cyberspace.[12] As Prassl and Risak[13] highlight, there are two sub-categories of platform work at play in these definitions. The distinction is made between platform work which is completed in the real world and that completed in the virtual world.[14]

The former, encapsulated by the first part of Cherry's definition, involves connecting platform users with workers online, whilst the actual work done is performed offline, in person.[15] For example, the Uber business model sees the Uber app 'deploy' the driver, who then provides the ride for the customer (or end user) face-to-face.

The second branch of platform work is, by contrast, 'performed wholly in cyberspace'. The app facilitates the work, but the work is then done online so there is no face-to-face engagement between platform worker and end-user. An example of such a platform is Amazon Mechanical Turk which operates throughout the USA, is available to users in the UK.

[11] Miriam A Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 COMP LAB L & POL'Y J 577.
[12] Ibid.
[13] Jeremias Prassl and Martin Risak, 'Uber, Taskrabbit, and Co.: Platforms as Employers - Rethinking the Legal Analysis of Crowdwork' (2016) 37 COMP LAB L & POL'Y J 619.
[14] Ibid, 622-624
[15] Ibid.

This platform provides a service which allows 'individuals and businesses to outsource their processes and jobs to a distributed workforce who can perform these tasks virtually.'[16]

The focus of this thesis will be on the first of these two forms of platform work. It is work performed offline which has been the source of much litigation, as platforms use contracts to explicitly state the platform workers are self-employed but – by other means explained below – control the way the work is done. This confuses protected status and, for this reason, all the case law surrounding platform work involves work performed offline.[17] As this is the case, this thesis will explore the issues pertinent to this kind of platform work.

1.2.2 What is Offline Platform Work?

The subject of this analysis, then, is what Cherry described as work 'aided by cellphone applications (apps) or websites, and they rely on technology to deploy workers to perform tasks.'[18] When we consider a typical example of platform work, this basic definition appears to be accurate.

Arguably the most well-known platform world-wide is Uber, which facilitated 6.9 billion rides in 2021.[19] Uber functions through the use of the Uber app. Platform users (Uber's customers) request a taxi ride to a specific location using the app. Platform workers (Uber drivers) in the local area are then offered the job which they can choose to accept or reject. Once the ride is accepted by a driver, they are then connected with the customer who specifies the exact point from which they would like to be collected. Once the ride has been completed, the fare is taken automatically from the user's bank account which is linked via the app. There is also the opportunity for both parties to review their experience with the other, most notably using a star rating system. It is evident from this sequence of events, which form the typical Uber ride, that defining platform work in its simplest form as something aided by apps and reliant

[16] See Amazon Mechanical Turk <https://www.mturk.com > accessed October 2020.
[17] For example, see *Uber* (n5); *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* [2017] 11 WLUK 313.
[18] Cherry (n11).
[19] Mansoor Iqbal, 'Uber Revenue and Usage Statistics (2020)' (Business of Apps, October 2020) < https://www.businessofapps.com/data/uber-statistics/#7> accessed 06 November 2020.

on technology is indisputably accurate. The subsequent sections of this chapter will highlight some of the nuances to platform work. However, if several other major platforms are considered, such as Deliveroo, TaskRabbit (which is active in 17 cities across the UK) or PeoplePerHour, all are reliant on the internet to connect the end users and those offering services. Thus, for now, it is possible to observe that the simplest definition of platform work above is accurate and applies universally to all work of this kind.

It is, of course, possible to offer a more detailed definition of platform work. Numerous scholars have attempted to offer as such (see discussion below). The following sections will analyse several of the key characteristics offered within these more detailed definitions to determine what exactly are the true characteristics of platform work. Only once this is done can we use these characteristics to attempt to determine whether platform workers can be considered legally as self-employed or as 'workers' under the current framework.

Four aspects of platform work have been picked out for further explanation. As will be explained in section 1.4, these four aspects play an important role in leaving platform workers stranded between worker and independent contractor status.

1.2.2.1 Micro Labour

One characteristic of platform work which has often been included in its definition is that it involves micro labour. Stross defines platform work as something that 'takes place by project, small gig or micro labour.'[20] We see this in practice if we, again, consider Uber as an example.

Uber rides and other such "gigs" or "tasks"[21] are designed to be short in length, with the aim of completing as many as possible within a short timeframe. This is a vital part of the Uber business model, allowing a quick turnover of rides and rapidly satisfying customer demand.[22] For example, there is a relatively short timeframe between an Uber customer requesting a ride, and that ride then being completed before the driver moves onto the next request. The

[20] Randall Stross, 'When the Assembly Line Moves Online' *New York Times* (New York, 31 October 2010) BU5.
[21] Ibid.
[22] *Aslam v Uber BV* [2016] 10 WLUK 681 [100].

result is that an Uber driver will complete several rides each time they switch on the Uber app and begin a shift. Consequently, to describe this platform work of this kind as involving micro labour would be accurate as the aim is to complete as short gigs as possible within a given timeframe. Commentators such as De Stefano would agree with this sentiment, as he describes platform work as involving microtasks whilst also using words such as 'menial', 'monotonous' and 'tightly bounded' to describe platform work.[23]

Though not the focus of this piece, it seems noteworthy that the second strand of platform work, performed fully online, is centred around the completion of even smaller tasks.[24] Given the micro nature of the tasks, the wage for this kind of wage is only around $2 an hour as the pay reflects the size of the tasks completed.[25]

1.2.2.2 Low Pay

Though it is not a feature of platform work in the same way as micro-labour, low pay has become an outcome of such labour. This does seem an important outcome to note, however, since access to minimum wage is often the purpose for platform workers taking action against platforms[26] – in order to benefit from the protection offered under the National Minimum Wage Act.[27]

Cunningham notes that the narrative of platform work has changed from one of promoting entrepreneurship, to utilising low pay and poor working conditions.[28] Given that platform work centres around the completion of many small tasks, it seemingly stands to reason that the remuneration for such work would be low. However, even when the platform work

[23] Valerio De Stefano, 'The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy' (2016) 37 Comp Lab L & Pol'y J 471.
[24] Prassl and Risak (n13).
[25] Irene Mandl et al, 'New Forms of Employment' (Eurofound, 2015) <http://www.eurofound.europa.eu/publications/report/2015/working-conditions-labour-market/new-forms -of-employment.> accessed 26 October 2020.
[26] For example in *Aslam* (n22).
[27] National Minimum Wage Act 1998.
[28] Keith Cunningham-Parmeter, 'Gig-Dependence: Finding the Real Independent Contractors of Platform Work' (2019) 39 N Ill U L Rev 379.

consists of more complex tasks requiring more skill, the platform worker is still paid less than their non-platform equivalent.[29]

Dukes notes the centrality of low remuneration to the platform business model, describing platforms as 'relying on a steady supply of cheap labour'.[30] Low pay is central to the business model of the platforms as they thrive on attracting business by offering cheaper alternatives to everyday services such as taxi rides or household work.[31] This is made possible by keeping labour costs low. This is a sentiment with which both Hogan[32] and Dubal[33] agree, with the former explaining that Uber's rise to success was largely down to its ability to lure in customers with low prices.[34]

Typically, platform workers across the world fall outside the legal protection of minimum wage regulations (for reasons explained in section 1.4). Pilaar, in his comparative analysis of platform work in the USA and France, affirms that in both countries platform workers are commonly denied minimum wage.[35] There has been some potential progress in the UK as a result of the Supreme Court's decision in *Uber v Aslam*[36], as a judicial trend finding worker status (and therefore entitled to minimum wage) continues.[37] However, low pay remains a common outcome for platform workers.

1.2.2.3 Flexibility and Control

Flexibility and control are characteristics of platform work which must be addressed together. As will be explained below, platforms promise flexibility to platform workers. However, in

[29] Debra Howcroft and Birgitta Bergvall-Kareborn, 'A typology of Crowdwork Platforms' (2019) 33(1) Work, Employment and Society 21.
[30] Ruth Dukes, 'Regulating Gigs' (2020) 83(1) MLR 217, 221.
[31] Howcroft and Bergvall-Kareborn (n29).
[32] Hilary Hogan, 'Rewinding the Clock: Workers' Rights in the Gig Economy' (2020) 9 King's Inns Student L Rev 114.
[33] Veena Dubal, AB5: Regulating the Gig Economy is Good for Workers and Democracy (American Constitution Society, 24 Sept 2019) < https://www.acslaw.org/expertforum/ab5-regulating-the-gig-economy-is-good-for-workers-and-democracy/ > accessed 26 October 2020.
[34] Hogan (n32).
[35] Jeremy Pilaar, 'Assessing the Gig Economy in Comparative Perspective: How Platform Work Challenges the French and American Legal Orders' (2018) 27 JL & Pol'y 47.
[36] *Uber* (n5).
[37] See also, *Addison Lee Ltd v Lange and Others* [2021] EWCA Civ 594.

reality, they exercise several controls which strongly limit the so-called "flexible" nature of platform work.

Arguably the main draw to those who become platform workers is the promise of flexible work. Most see flexibility as relating to the platform worker's schedule. Cherry notes that platform workers can 'set their own schedules and can sign on and off the app more readily than do real workers in a traditional environment'.[38] Calo and Rosenblat agree with this sentiment, stating that the flexible schedule is amongst one of several 'concrete benefits' for platform workers.[39] For example, if a parent must drop their child off at school in the morning and collect them only a few hours later, platform work would allow them to utilise those free hours and earn some form of income when even a part time job may not have been possible given their time constraints and responsibilities as a parent.[40] Furthermore, platform workers can 'switch jobs at will'[41] , which also contributes to the flexibility of platform work. This means that, without being contractually obliged to work a specific number of shifts, it is easy for someone to simply stop logging into an app and begin working for a different platform. The overall effect here is to say that, in relation to the work schedule, platform work does allow a level of flexibility.

An alternative manifestation of the flexibility of platform work is apparent in relation to the eligibility criteria set by platforms when allowing workers to sign up to work using their app. It is noted that there is a low bar set to enter into work for an online platform.[42] The result of this low bar is that there is easy access to platform work[43] and this removes barriers from finding work for those who may otherwise struggle to do so, such as people with a criminal record or a lack of education.[44] With such a low barrier to accessing platform work, it appears that almost anyone can become a platform worker. This flexibility allows almost anyone to

[38] Cherry (n11)
[39] Ryan Calo and Alex Rosenblat, 'The Taking Economy: Uber, Information and Power' (2017) 117 Colum. L. Rev 1623.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Cherry (n11).
[44] Tawanna R. Dillahunt and Amelia R. Malone, 'The Promise of the Sharing Economy Among Disadvantaged Communities (AMC Conference on Human Factors in Computing Systems, 2015) < https://dl.acm.org/doi/10.1145/2702123.2702189> accessed 03 November 2020.

earn money by utilising their assets which may be in excess or go to waste for periods of time such as a spare bedroom or car that is not used for certain hours of the day.[45] Lobel believes that 'a key principle of platform work is putting idle capacity to work'[46], and this is arguably made possible thanks to the flexible nature of platform work both in respect to the schedule platform workers follow, and the flexible rules allowing easy access to platform work.

However, the reality is one in which flexibility is limited by the platform, using several methods of control. It is argued, therefore, that describing platform work as "flexible" may not paint an accurate picture.

First, the flexibility in relation to the ease of access to platform work seems somewhat limited when we consider that in order to even make platform work possible, one must first possess the necessary tools to complete a task. Often this is not a cheap or minor piece of equipment, such as a car.[47] Thus, if we take, for example, an ex-convict who is looking to become an Uber driver because they are unable to find traditional employment, they are unable to do so if they do not own a car. This arguably limits the apparent flexibility with regards to the accessibility of platform work.

There are further limits to both the flexibility of a platform worker's schedule and their access to platform work. The nature of the micro labour which is typical to platform work often requires only a low level of skill. Consequently, these "easy" tasks are within many people's capabilities and so many people are in competition for the same job. It is because of this that rejection rates are incredibly high.[48] Kessler attempted to find work across several US platforms and found that for every job she was given, she was also rejected from five others.[49] She was 'competing for every hour'[50] of employment, unsure when the next job would be available. As a result, we can begin to see that, although the schedule and access to platform

[45] Yochai Benkler, 'Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production' (2004) 114 Yale L.J. 273, 297.
[46] Orly Lobel, 'The Law of the Platform' (2016) 101 Minn. L. Rev. 87, 108.
[47] Cherry (n11)
[48] Ibid, 601.
[49]Sarah Kessler, 'Pixel & Dimed On (Not) Getting By in the Gig Economy' (*Fast Company*, 18 March 2014) <https://www.fastcompany.com/3027355/pixel-and-dimed-on-not-getting-by-in-the-gig-economy> accessed 20 December 2019.
[50] Ibid.

work appear to be flexible, the reality is that both are under serious limitations. A platform worker's schedule and access to work is completely dependent on winning a competition to be chosen to perform each task. Furthermore, tasks can be cancelled by a platform user, even whilst the platform worker is in the process of completing that task.[51] When this occurs, often there is no payment for the platform worker, who must themselves bear the cost of cancellation.[52] This means not only is there a limit to who gets work as a result of intense competition, but even those who find work are reliant on the platform user not cancelling the work prior to completion.

Even for those who both find platform work to do and are allowed to complete this work without the task being cancelled by the platform user, there are other significant limitations to their "flexible" work. These limitations take the form of several controls that the platforms themselves implement on platform workers. Kessler described the platform work ideal, depicting a world in which 'you are no longer just an employee with set hours and wages working to make someone else rich. In the future, you will be your very own mini-business.'[53] However, this ideal seems far from being a reality, with some such as Tomasetti concluding that platforms exert such a level of control upon 'virtually all aspects of service provision' that it is 'depriving the workers of the ability to carry out business independently.[54]

There are several examples of control being exercised over platform workers. An extremely common method used by platforms is a rating-based system by which platform workers are awarded a star rating by the platform user after having completed each task. If we again take Uber as the example, after each ride has been completed, the driver is given a rating between 1 and 5 stars by their customer.[55] This is a high level of control exerted onto platform workers, albeit vicariously through their customers.[56] This is because it is vitally important that platform workers maintain a high rating. Otherwise, jobs will be either harder to come by, or they will be removed from the platform altogether. Uber drivers accounts are deactivated if

[51] Cherry (n11).
[52] Ibid.
[53] Kessler (n49).
[54] Julia Tomassetti, 'Digital Platform Work as Interactive Service Work' (2018) 22 Emp Rts & Emp Pol'y J 1, 5.
[55] *Aslam* (n22).
[56] Cherry (n11)

their average rating falls below 4.7 out of 5 stars.[57] Thus, the rating system means that platforms are making sure that their platform workers are under constant surveillance and review. This appears to be a very strict control on the quality with which platform workers carry out their tasks[58], especially since failure to meet the required rating average is potentially punishable by the deactivation of their account. [59]

As well as monitoring the level of work done by platform workers, platforms can also control the amount of that must be done. First, it is not always the case that working time is flexible and completely down to the choice of the platform worker. For example, Deliveroo drivers are contractually obliged to state beforehand when they are available to work. There is then an expectation that they are available at those times and failure to be available to work at those times is potentially punishable by dismissal.[60] Thus, the platform is exercising a level of control over the times that the riders must work. Moreover, whilst platform workers are logged onto the platform, further control on the working time seems to be in place. Uber drivers can be sanctioned if they fail to meet Uber's demands on the number of rides they accept.[61] This, along with being inactive for a prolonged period of time, can result in the driver's account being deactivated.[62] The result is that these platform workers must work at least the minimum amount set out by the platform or risk being deactivated. Given this, it appears that platform work is, in reality, not as flexible as it first seems – as platforms are enforcing standards with regards to the number of tasks being undertaken by each platform worker.

Not only do platforms use ratings to constantly monitor platform workers and apply controls as to the amount of work that must be done, platforms also frequently dictate the terms of

[57] Alex Rosenblat and Luke Stark, 'Uber's Drivers: Information Asymmetries and Control in Dynamic Work' (Data & Society Research Institute, October 2015) <https://algorithmsatwork.files.wordpress.com/2016/02/rosenblat-stark-information-asymmetries-and-control-in-dynamic-work-cscw-2016.pdf> accessed 03 November 2020.
[58] Ewan McGaughey, 'Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status' [2019] 48(2) ILJ 180, 193.
[59] *Aslam* (n22).
[60] 'Deliveroo Scooter Contract' (*Parliament UK)* < https://www.parliament.uk/documents/commons-committees/work-and-pensions/Written_Evidence/Deliveroo-scooter-contract.pdf> accessed 20 December 2019.
[61] McGaughey (n39), 193.
[62] Alan Bogg, 'Between Statute and Contract: Who is a Worker?' [2019] 135(Jul) L.Q.R 347.

the transaction which occurs between the platform worker and the platform user. Prassl and Risak note that there is a significant level of control not only on the supervision of work but also on matter such as setting wage.[63] Following the Uber example, when an Uber driver takes a ride, all the details of the ride from where to collect the passenger, which route should be taken, and calculating payment, are all finalised by Uber through the app. Cherry notes that there is little employee discretion over tasks and how they are completed[64] and this is demonstrated by the lack of bargaining power platforms often given to platform workers to set their own wage. From the moment Uber connects a driver to a passenger, to the moment that the ride is completed, the driver has zero bargaining power or involvement in any of the terms of the transaction that has just occurred. Although some platforms do allow for their workers to set their own hourly wage[65], they are still subject to star rating controls and, given the competitive nature of platform work, cannot set their wage too high as it may deter platform users from selecting their services.

Platform work is sold as flexible work that can be done to one's own schedule and is free from the control of any so-called "boss" – as that platform workers are supposedly given the freedom and flexibility to be in business for themselves. However, on reflection, it is evident that this is not the case. Flexibility of schedule is limited either by access to resources or the intense competition many platform workers face for each task. Furthermore, the platforms often set minimum hours that must be worked, or numbers of tasks accepted, to avoid a worker's account being deactivated. Here, the platform worker's schedule is strongly influenced by the platform. There is also a lack of flexibility in relation to how platform work can be carried out. This is due to the strict star rating system that platforms use to defer quality surveillance onto their customers and ensure that platforms workers are carrying out tasks to a high standard. Finally, there is extremely little flexibility for platform workers to influence the terms of the transactions they enter into. In many cases, all aspects are decided by the platform, on an app, and there is no room for this to be amended by any platform worker. In reality, platform work is strictly controlled and the platform's tag-line that work is flexible, is misleading.

[63] Prassl and Risak (n13).
[64] Cherry (n11).
[65] For an example, see TaskRabbit <https://www.taskrabbit.co.uk/become-a-tasker>.

1.2.2.4 A 'Non-Standard' Form of Work

De Stefano and Aloisi describe platform work as being a 'non-standard' form of employment.[66] This is defined as 'temporary employment, part-time work, temporary agency work and other multi-party employment relationships, disguised employment relationships and dependent self-employment.'[67] This does, however, covers a non-exhaustive list of work arrangements. [68]

Using this to describe platform work does involve making an assumption that the traditional employment relationship is still the standard, despite there being an apparent transformation of the labour market since the turn of the 21st century.[69] This transformation has seen greater emphasis placed onto flexibility and is beginning to move away from the traditional employment relationship which centres on long-term employment.[70] In spite of this, traditional and standard employment is still the focus of and at the centre of the vast majority of employment legislation.[71] Furthermore, the traditional employment relationship still accounts for around 70% of all employment across Europe and the United States.[72] As a result, it appears as though 'non-standard' work is the most accurate way of describing platform work. This may be something that changes over time as the labour market continues to edge further away from traditional employment. However, for the time being at least, non-standard work accurately covers all platform workers.

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[66] Valerio De Stefano and Antonio Aloisi, 'Fundamental Labour Rights, Platform Work and Human-Rights Protection of Non-Standard Workers' (SSRN Electronic Journal, January 2018). < https://www.researchgate.net/publication/323766255_Fundamental_Labour_Rights_Platform_Work_and_Human-Rights_Protection_of_Non-Standard_Workers?enrichId=rgreq-91cb8bcee33e7df1cca78ac39d87b8de-XXX&enrichSource=Y292ZXJQYWdlOzMyMzc2NjI1NTtBUzo2MzcwMzk5MDUxMDc5NjhAMTUyODg5MzU1NzA4MA==&el=1_x_2&_esc=publicationCoverPdf> accessed 28 October 2020.

[67] International Labour Office (ILO), *Non-standard employment around the world. Understanding challenges, shaping prospects* (ILO 2016a)

[68] De Stefano and Aloisi (n66).

[69] Stone (n1).

[70] Ibid.

[71] Guy Davidov, Mark Freedland and Nicola Countouris, 'The subjects of Labor Law: 'Employees' and Other Workers', in Mattew Finkin & Guy Mundlak (eds), *Research Handbook in Comparative Labor Law* (Edward Elgar 2015).

[72] International Labour Office (ILO), '*Non-standard forms of employment' Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment (Geneva, 16–19 February 2015)* (ILO 2015).

The word precarious is often used to describe platform work, with the likes of Cherry describing it as 'focused on precariousness'.[73] However, De Stefano and Aloisi argue that this is not an accurate description.[74] Untraditional work, such as platform work, does not necessarily have to be precarious. As De Stefano describes, 'there could be non-standard work contracts that nonetheless afford sufficient stability of employment and income, such as some form of fixed-term or part-time contracts.'[75] Although this seems unlikely to apply to platform work given the emphasis placed that the platforms place on flexibility, it is still worth noting that this is a possible means through which platform work could stable.

Furthermore, precariousness does not apply only to those who operate outside of the traditional working relationship but is also a possible way to describe those who would satisfy the legal definition of 'employee'.[76] For example, when a qualifying period is attached to a statutory employment right, during the period before the specified period of continuous employment has elapsed, one is not protected. The result could mean that even a traditional employee is unable to claim 'maternity leave, redundancy pay or action against unfair dismissal'.[77] As a result, it is accurate to describe platform work as being a 'non-standard' form of work.

The aim of this chapter thus far has been to describe platform work as accurately as possible, so we can move onto see how the nature of platform work means it does not fall neatly into any one of the categories of protected status. We have seen that platform work – beyond being work 'aided by cellphone applications (apps) or websites, and they rely on technology to deploy workers to perform tasks'[78] – is a non-standard type of work which usually centres on the completion of small tasks or micro-labour, for which pay is low. Platform work is also associated with the promise of job flexibility. However, that promise is broken by the controls

[73] Cherry (n11) 599.
[74] De Stefano and Aloisi (n66)
[75] Ibid.
[76] Nicola Kountouris, 'The Legal Determinants of Precariousness in Personal Work Relations: a European Perspective' (2013) 34 CLLP'Y 21.
[77] De Stefano and Aloisi (n66).
[78] Miriam A Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 COMP LAB L & POL'Y J 577.

exercised by platforms, which substantially impair a platform workers ability to work in a truly flexible manner. Now that we have analysed the different interpretation of what platform work really is, we can begin to see how platform work may (or may not) fit into the current legal framework which determines employment status. Once this has been done, it will become evident that, due to the nature of platform work, it does not fit comfortably within the current legal framework and is left in a no-mans-land between 'worker' status and self-employment.

1.3 The Legal Framework for Protected Status

Given that we now have an accurate description of platform work, it is possible to analyse the way in which it interacts with the current legal framework to determine protected status. Under the current legal framework there are three possible categories into which it is possible to fall. It is possible to be legally defined as an 'employee', 'worker', or an 'independent contractor', also referred to as being self-employed. A full plethora of employment rights are available to those who satisfy the 'employee' definition. The 'worker' category acts as an intermediary category between 'employee' and 'independent contractor'. Anyone who satisfies the 'worker' definition has access to basic employment rights, such as access to minimum wage.[79] An 'independent contractor' does not have access to any of these rights. In order to illustrate that platform workers do not fit comfortably into any of these categories, it is first crucial to understand the tests which determine protected status.

1.3.1 The 'Employee' Definition

The legal definition of 'employee' can be found in section 230(1) of the Employment Rights Act 1996. It is defined here as meaning 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.'[80] The judiciary seek to determine the existence of a contract of employment using the test pioneered in the *Ready Mix Concrete*[81] case, and later developed in *Montgomery v Johnson*

[79] NMWA 1998.
[80] Employment Rights Act 1996 s230(1).
[81] *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions* [1968] 2 QB 497.

Underwood.[82] In *Montgomery*, it was held that an irreducible minimum of control and mutuality of obligation are crucial in order to establish a contract of employment. Furthermore, there must be no factors inconsistent with employment. Only if all of these elements are satisfied can 'employee' status be found.

Platform workers in the UK have not claimed to be employees.[83] Instead, the litigation, such as the *Uber*[84] litigation, has centred around the 'worker' definition with no mention of employee status. Thus, we should pay more attention to how it is possible to satisfy the 'worker' definition.

1.3.2 The 'Worker' Definition

The 'worker' definition is used as an intermediary between 'employee' status and self-employment. It extends the application of some basic employment rights to those who do not satisfy the 'employee' definition but are not truly independent contractors. This is a concept which has been around from as early as 1875.[85] Labour laws in the 1970's saw the 'worker' definition become an important way of expanding the definitions of employment[86] to offer protection to those who did not satisfy the 'employee' definition.[87]

The New Labour Government of the late-1990's and early-2000's believed that even those who did not satisfy the employee definition should have access to the most basic employment rights.[88] As a result, the 'worker' definition featured prominently in the provisions enacted during that period, such as the National Minimum Wage Act[89], the Working Time Regulations[90], the Trade Union and Labour (Consolidation) Act[91] and the Employment Rights

[82] *Montgomery v Johnson Underwood* [2001] IRLR 269.
[83] Some do argue that platform workers should be classified as employees. See Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach' (2017) 6(1-2) *Spanish Labour Law and Employment Relations Journal* 6.
[84] *Aslam v Uber BV* [2016] 10 WLUK 681; *Uber BV v Aslam* [2017] 11 WLUK 238; [2018] EWCA Civ 2748; [2021] UKSC 5.
[85] Guy Davidov, 'Who is a Worker?' [2005] 34 ILJ 57, 58
[86] Ibid.
[87] Simon Deakin and Gillian S Morris, *Labour Law* (6th edn, Hart Publishing 2012) 175.
[88] Deakin and Morris (n87).
[89] NMWA 1998, s54(3).
[90] WTR 1998, reg 2(1).
[91] Trade Union and Labour Relations (Consolidation) Act 1992 s 296.

Act.[92] It is from this Act that we have the most current statutory definition of 'worker'. 'Worker' status is thus afforded to anyone who is under 'a contract of employment', or 'any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'.[93]

The manner in which the courts have applied this definition means that there is very little difference between the 'employee' and 'worker' definitions. Commentators, such as Countouris, have noted that the difference between 'employee' and 'worker' have been conflated as a result of the judiciary's interpretation of the two.[94] Mutuality of obligation is still a necessary requirement to find 'worker' status[95] and the courts do not believe that it is possible to lower the bar on mutuality, describing it as a vital rock acting as the basis of any contractual relationship.[96] Thus, mutuality must be present during every gig undertaken in order to establish 'worker' status, as was confirmed in *Cotswold Developments.*[97]

Worker status also requires that work is done personally. Person service in this context means that the work must be performed personally by the individual in question and cannot be performed by any substitute. The *Byrne Brothers* case lowered the bar on personal service required to find worker status compared to establishing employee status. As a result, a qualified substitution clause does not exclude the court from finding worker status.[98] Although this lowered the bar on personal service, it was also held in *MacFarlane v Glasgow City Council* that an unqualified substitution clause can also be consistent with 'employee' status.[99] Furthermore, the absence of personal service is particularly fatal to a claim seeking

[92] ERA 1996.
[93] ERA 1996, s 230(3).
[94] Nicola Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing 2015).
[95] *Byrne Brothers v Baird* [2002] ICR 667.
[96] *Carmichael v National Power Plc* [1999] ICR 1226 [1229].
[97] *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181.
[98] *Byrne Brothers* (n95).
[99] *MacFarlane and another v Glasgow City Council* [2001] IRLR 7.

recognition of worker status.[100] Therefore, the test which is applied to find worker status is extremely similar to that used to find employee status.

The difference between the two comes in the form of continuity. This is demonstrated well by the employment rights which come attached to a qualifying period. In order to access the full plethora of rights available to employees, it is necessary that there is continuous employment for a specific length of time. When one of those rights is attached to a qualifying period, only once this time has elapsed can the 'employee' benefit from the protection of the right in question. [101]

A worker, however, does show the same continuity. Between each gig, there is no mutuality, as there is no mutual obligation for them to either be provided with work, or accept it. There is no continuous, or umbrella, contract which links each individual gig and accumulates any period of continuous employment. This lack of continuous employment is the main difference between workers and employees.[102] The basic rights afforded to 'workers' do not come attached to a qualifying period and, as a result, the lack of mutuality between each individual 'gig' worked does not prevent access to these rights.

1.4 Failing to Fit In: Applying the Tests to Platform Work?

Given that we have analysed the characteristics of platform work and laid out the necessary test to determine employment status, it is possible to determine how the two fit together. Doing so, it soon becomes apparent that it is far from a perfect fit.

First, we should note that, due to the lack of mutuality between each 'gig', platform workers would not be able to satisfy the requirement of continuous employment necessary to have

[100] See *R (on the application of Independent Workers' Union of Great Britain (IWGB)) v Central Arbitration Committee* [2018] 12 WLUK 17.
[101] It is important to note that not all employment rights come attached to a qualifying period. Some are available immediately. For example, statutory maternity leave and pay. The material difference between worker and employee rights is the continuity of obligations.
[102] *James v Redcats (Brands) Ltd* [2007] IRLR 296.

access to all the rights attached to the 'employee' definition. For example, when logged out of the app, there is no umbrella mutuality present as there is no obligation on the platform workers to be offered or accept any work whilst logged off. Consequently, platform workers must fall into either the 'worker' or 'independent contractor' status.

If we analyse the contracts in place between platform workers and the platforms themselves, there tends to be an express denial of worker status, stating that each individual is an 'independent contractor'. Some even deny that any contract exists between the platform and the platform worker.[103] However, since the Supreme Court judgment in *Autoclenz v Belcher,*[104] the wording of the contract is only one consideration when determining the protected status of an individual. A holistic approach is taken, analysing the practical realities of the relationship between the individual and the hiring entity.[105] If we apply the same test to the foundations of platform work analysed earlier in this chapter, it is clear that there is much more to the platform-platform worker relationship than any written contract between the two would suggest.

Platforms deny that there is any mutuality of obligation between themselves and platform workers.[106] Going to the elements of platform work discussed earlier – we see the platform's basis for this claim. The micro-labour nature of platform work means there is no mutual obligation to perform work beyond each small gig. Furthermore, the concept of flexibility seems to imply there is no obligation for work to be done. The platforms themselves would argue that, at no point, is there any obligation on either party to offer or accept any work. Yet, in the analysis of the characteristics of platform work, it became clear that this is not always the case. The controls used by platforms, such as requiring platform workers to accept a minimum number of tasks or face having their account deactivated, seem to place an obligation onto the platform worker to accept the work.[107] It is for this reason that commentators, such as McGaughey, believe that there is a strong argument that mutuality of

[103] *Aslam* (n22).
[104] *Autoclenz Ltd. v Belcher* [2011] UKSC 41.
[105] Anirudh Mandagere A, 'Examining Worker Status in the Gig Economy' (2017) 4 J Int'l & Comp L 389, 392.
[106] For examples, see 'Uber Legal' < https://www.uber.com/legal/en/ > ; Deliveroo Scooter Contract (n60).
[107] McGaughey (n58).

obligation is present in the platform-platform worker relationship.[108] However, what this shows is that there is a clash between the flexible nature of platform work, and the controls exercised by platforms which leave little choice but to undertake work. Therefore, it is argued that platform workers do not fit soundly into either worker status or self-employed status, when considering the requirement of mutuality of obligation.

Personal service is also required in order to find 'worker' status. Again, platforms attempt to use the contract between themselves and platform workers to ensure this requirement is not satisfied. This is often through the use of substitution clauses. In *Deliveroo*[109], an unqualified substitution clause was found to be fatal to the riders claim that they were 'workers' for the purposes of s296(1) of the Trade Union and Labour Relations (Consolidation) Act 1992.[110] Although the reality suggests that riders would not make use of the substitution clause, the fact it was present in the contract and could be made use of if necessary, meant that the riders were found to be 'independent contractors'.[111] Again, this shows that the protected status of platform workers in unclear because, regardless of the extent of control exerted, a platform can seemingly avoid worker status being found through the use of a valid, unqualified substitution clause.[112]

The result of applying the characteristics of platform work to the tests for employment status is, overall, confusing. On the one hand, platforms use their contracts to deny the existence of mutuality of obligation between themselves and platform workers. However, the reality suggests that the control exerted over platform workers leaves them in a position whereby they are obliged to accept the work offered to them whilst logged onto the platform. Furthermore, *Deliveroo* left the door open for platforms to use unqualified substitution clauses as a means of negating the requirement for personal service.

[108] Ibid.
[109] *R (on the application of Independent Workers' Union of Great Britain (IWGB)) v Central Arbitration Committee* [2018] 12 WLUK 17.
[110] Trade Union and Labour Relations (Consolidation) Act 1992, s296(1).
[111] *IWGB* (n109).
[112] Alan Bogg, 'Taken for a Ride: Workers in the Gig Economy' (2019) L.Q.R 135, 219.

1.5 The Circumstantial Nature of Platform Work

The protected status of platform work is already unclear, as stated above, due to the nature of platform work outwardly exhibiting elements of both worker and independent contractor statuses. However, the circumstantial nature of platform work also means it is difficult to predict which category they will be found to fall in, as no two cases are factually identical. Therefore, it cannot be said with certainty that any one decision can be followed to find protected status.

Platforms all operate in different ways. Uber does not allow substitutions, yet Deliveroo does.[113] Uber drivers have no control over their pay, yet TaskRabbit platform workers can set their hourly rate. Deliveroo drivers need only accept one task every three months, whilst Uber drivers must accept around 80% of work offered to them.[114] These differences each have a major impact on the way a court would analyse each case and determine the employment status of each platform worker. We can see this if we compare the outcomes of the *Uber* and *Deliveroo* litigations (both will be analysed in detail in subsequent Chapters). It is argued that this creates unnecessary confusion and new, platform-specific legislation would be able to clarify protected status. A new approach is needed which reflects the way in which the labour market is changing. As Doherty and Franca believe, by applying the same, old-fashioned tests to new and innovative methods of work, we are just causing great uncertainty[115] because, as we have seen, the tests do not seem to fit this modern approach to work. The result of this is that, 'not only are [platform workers] more exposed to violations of fundamental rights but are also often excluded from the legal scope of application of these rights'.[116] A legislative approach would take significant steps to modernise the tests used in order to determine an individual's protected status and thus help platform workers find their way out of the no-mans-land between 'worker' and 'independent contractor' in which they are currently lost.

[113] Nigel Forsyth, '"I'm a Substitute for Another Guy": Deliveroo performs live at the CAC' (Keystone Law, 23 November 2017) < https://www.keystonelaw.com/keynotes/im-a-substitute-for-another-guy-deliveroo-performs-live-at-the-cac> accessed 25 November 2020.
[114] Ibid.
[115] Michael Doherty and Valentina Franca, 'Solving the 'Gig-saw'? Collective Rights and Platform Work' (2019) 49(3) ILJ 352.
[116] De Stefano and Aloisi (n66).

As Chapters 2 and 3 will explain in more detail, legislation could provide a clearer and more certain test to accurately categorise platform workers.

1.6 Conclusion

This chapter has sought to analyse the characteristics of platform work to paint as accurate as possible a picture, depicting exactly what this kind of work entails. We have seen that platform work is that a non-standard type of work, aided by online applications, which usually revolves around the completion of small tasks or micro-labours, for low pay. Furthermore, despite the promises of job and schedule flexibility, we have seen that this is not always the case as platforms implement several controls, such as star rating systems, which make it almost impossible for platform workers to truly be in business for themselves as they 'actively shape' the entire platform work process.[117]

Analysis then moved to the definitions used to determine employment status. It was noted that, in order to be classified as a 'worker', the requirements are almost identical to gaining 'employee' status, save the need for continuous employment. Mutuality is required, along with control and personal service.

Finally, we looked at how platform workers fit into the tests determining employment status. Here, it was argued that the current outlook is uncertain. Whilst applying the current, traditional tests for employment status there is a great conflict between the claims made by platform, and the realities of the working relationship between the platforms and platform workers. Whilst platforms often deny the existence of mutuality and the requirement of personal service, the reality is that controls are implemented which create obligations for platform workers to accept the work offered to them. Overall, it is evident that using the current tests to determine employment status, platform workers are left stranded between

[117] Jeremias Prassl, *'Humans as Service: The Promise and Perils of Work in the Gig Economy'* (1st edn, OUP 2018).

'worker' and 'independent contractor' status. As a result, we should seek a more certain, legislative approach to categorising platform work.

CHAPTER 2: A CASE OF *UBER*-IMPORTANCE – HAS THE *UBER* LITIGATION CLARIFIED PROTECTED STATUS?

2.1 Introduction

In order to make the case for legislative reform which clarifies the status of platform workers we must first understand the attempts made by the judiciary to achieve such clarity. The *Uber* litigation represents the highest profile case in which platform workers have sought to clarify their protected status, seeking worker status. The final Supreme Court judgment was handed down early in 2021, confirming that the Uber drivers in that case are to be treated as 'workers' benefitting from the basic labour rights attached to such protected status. This chapter will analyse each stage of the *Uber* litigation and the approach taken by the judiciary to determine protected status. It will be argued that, despite the favourable outcome for the drivers in *Uber*, we are still without a unified test which brings clarity as to the protected status of platform workers.

2.2 The *Uber* case

The decisions handed down by the Employment Tribunal (ET)[118], Employment Appeal Tribunal (EAT)[119], Court of Appeal[120] and Supreme Court [121]will all be analysed within the context of scholarly debate as to whether *Uber* can be used going forward to bring clarity to the protected status of platform workers. However, it seems important to first give some context as to the issues addressed by the judiciary in *Uber*, and the basis of Uber's argument and subsequent appeals.

[118] *Aslam v Uber BV* [2016] 10 WLUK 681.
[119] *Uber BV v Aslam* [2017] 11 WLUK 238.
[120] *Uber BV v Aslam* [2018] EWCA Civ 2748.
[121] *Uber BV v Aslam* [2021] UKSC 5.

2.2.1 The Origins of *Uber*

The *Uber* litigation began in the ET in 2016 when a group of drivers, led by Mr Aslam, brought a claim against Uber. The drivers sought to be legally recognised as 'workers' for the purpose of benefitting from the protection offered by the National Minimum Wage Act[122] and the Working Time Regulations[123]. Specifically, the drivers believed they were entitled to the minimum wage and paid annual leave, neither of which were being offered by Uber. Two of the claimants also brought an action under Parts IVA and V of the Employment Rights Act 1996 for detrimental treatment on whistle-blowing grounds.[124]

There were two main issues which the Tribunal had to address to determine whether Uber drivers had access to their desired basic labour law protections. The most crucial of these questions was to determine whether the drivers were employed as 'workers', in the legal sense, by Uber London.[125]

Uber was refusing to offer the basic legal protections on the grounds that the drivers were independent contractors with whom Uber did not enter into a worker contract. So-called 'Partner Terms'[126] agreed between Uber and their drivers explicitly denied the existence of any contractual relationship which would grant the drivers access to even basic labour law rights and protections.[127] This formed the basis of the case made by Uber. It claimed to be nothing more than a technology service through which drivers and passengers meet and form their own contracts for the purpose of completing individual rides.

[122] NMWA 1998.
[123] WTR 1999.
[124] *Aslam* (n118).
[125] The second issue concerned working time, which is beyond the scope of this piece. See Deirdre McCann, 'Mencap and Uber in the Supreme Court: Working Time Regulation in an Era of Casualisation', (OxHRH Blog, April 2021), <https://ohrh.law.ox.ac.uk/mencap-and-uber-in-the-supreme-court-working-time-regulation-in-an-era-of-casualisation/ > accessed December 2021.
[126] *Aslam* (n118) [32]
[127] Bogg between statute and contract.

Several commentators[128] have highlighted the complexity and ambiguity of Uber's argument, in particular its use of the 'Partner Terms' to make the case that the drivers were no more than independent contractors. The Partner Terms are the terms used by Uber to govern their relationship with their drivers. There is no negotiation involved in the agreement of these terms – either a driver agrees, or they do not become an Uber driver. The Terms begin with a set of definitions, including that of a role described by Uber as a 'Partner'.[129] This role is defined as 'the party having sole responsibility for the Driving Service'.[130] Meanwhile, the 'Driver' is separately defined as the 'person who is an employee or business partner of, or otherwise retained by, the Partner and who shall render the Driving Service of whom the relevant ... details are provided to Uber.'[131] The Terms then state that a legal relationship is formed only between the Partner and the customers, with Uber having no influence over that relationship as it does no more than provide a technology platform, connecting customers with those offering driving services.[132] Uber described itself as an agent connecting drivers and customers, insinuating that it was in fact Uber who worked for the drivers.

As McGaughey points out, despite the roles being defined and treated separately by the Terms, the same person most often takes the role of both driver and 'Partner'.[133] It follows, then, that the supposed Partner is 'an artificial entity' created by Uber to distance itself from the possibility of creating a protected working relationship between itself and its drivers, at least on paper.[134] There is no doubt that the Terms are unnecessarily complicated, ambiguous and confusing.

This is a sentiment with which the Tribunal agreed. In its rejection of the Partner Terms as a valid representation of the working reality, the Tribunal held that Uber had resorted to 'fictions, twisted language and even brand-new terminology'[135] to try and make its

[128] For example: Ewan McGaughey, 'Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status' [2019] 48(2) ILJ 180, 192 ; Sandra Fredman and Darcy Du Toit, 'One Small Step Towards Decent Work: *Uber v Aslam* in the Court of Appeal' [2019] 48(2) ILJ 260, 266.
[129] *Aslam* (n118) [32].
[130] Ibid.
[131] Ibid.
[132] *Aslam* (n118) [33].
[133] McGaughey (n128).
[134] Fredman and Du Toit (n128).
[135] *Aslam* (n118) [87]

description as a mere technology service stick. Taking such extreme lengths 'merits scepticism'[136], and the Tribunal felt that Uber had tried so hard to sell this reality, it was compelled to quote the famous line from Shakespeare's Hamlet: 'The lady doth protest too much, methinks'.[137]

The Tribunal rejected Uber's argument, finding a contract between Uber and the drivers which fell under the definition of worker status. The ET's precise reasoning, along with that of the EAT, Court of Appeal and Supreme Court, will be analysed in depth below. However, this will be done in the context of whether the decisions have taken steps towards clarifying the protected status of platform workers.

2.3 *Uber:* A Judicial Solution?

Chapter 1 demonstrated that platform work does not fit comfortably into any of the categories of protected status and argues that legislation should be enacted to clarify protected status. However, the *Uber* decision has been welcomed by many commentators who believe this, judicial route, is the way forward for platform work. We will address these claims and use the various judgements to assess whether *Uber* really has provided us with a judicial solution which clarifies the protected status of platform workers.

It is submitted that there are two key elements to the most recent, and legally most significant, Supreme Court decision. Therefore, the discussion will centre around these elements. First, we must look at how the Court's approach to interpreting the statutory tests has impacted the clarity of protected status. Second, we will look at the judicial analysis of control across each stage of the Uber litigation. When we do this, it becomes apparent that further steps, in the shape of legislative intervention, are required if we seek to clarify the protected status of platform workers.

2.3.1 Contract Vs Reality – The Purposive Approach

[136] Ibid.
[137] Ibid.

The purposive approach is hailed by those who favour a worker-friendly reading of labour law legislation – but is a flawed means of brining clarity in a way that would reduce misclassification of platform workers and the need for litigation.

However, some have argued that the most significant element of the Supreme Court's decision in *Uber* is its expansion of the purposive approach to determining protected status[138] - and that this has brought clarity to the protected status of platform work. Prior to the Supreme Court's decision in *Uber*, the leading authority on such an approach was the Supreme Court's decision in *Autoclenz v Belcher.*[139]

2.3.1.1 How the Court Developed the Purposive Approach

Autoclenz concerned a group of valets who sought to be recognised as workers entitled to the national minimum wage and statutory paid leave.[140] The valets had signed a contract with Autoclenz which stated that were not employed but were sub-contractors who must provide their own materials and were under no obligation to be provided with or accept work.[141] Furthermore, the contract included a substitution clause supposedly allowing a qualified substitute to take the place of an individual and cover their work. However, it was held that the valets satisfied the definition of both employees and workers. The contract was dismissed as the ET, Court of Appeal and Supreme Court all felt that it did not reflect the reality of the relationship between Autoclenz and the valets. The EAT[142] had overruled the ET's findings, but this was itself overruled by the Court of Appeal.[143]

As per Lord Clarke, the case required the Court to consider when it is possible to 'disregard terms which were included in a written agreement between the parties and instead base its decision on a finding that the documents did not reflect what was actually agreed between

[138] Joe Atkinson and Hitesh Dhorajiwala, 'The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber*' (2021) 0(0) MLR 1.
[139] [2011] UKSC 41.
[140] Ibid.
[141] Ibid.
[142] EAT [2008] 6 WLUK.
[143] [2009] EWCA Civ 1046.

the parties of the true intentions or expectations of the parties'.[144] This goes beyond the 'sham' doctrine[145] which was established in *Snook v London and West Riding Investments*[146] which permitted the disregard of written contractual terms 'should there be a common intention to give an appearance of creating legal rights and obligations different from the actual ones which the parties intended to create.'[147] *Autoclenz* went further by determining the 'true agreement between the parties'[148] which was 'gleaned from all the circumstances of the case, of which the written agreement is only a part'.[149] Instead of simply disregarding 'sham' terms as in Snook, the contract became only one piece of evidence used in a broader analysis of the circumstances of the case. Furthermore, this was to be done with reference to the 'relative bargaining power of the parties'.[150] It is the imbalance in bargaining power between an organisation offering work and the individual looking for work which distinguishes cases such as *Autoclenz* from commercial disputes. The individual looking for work has to terms dictated to them with no chance to negotiate. Thus, in addressing issues relating to agreements and contracts to perform work, it is important to be 'realistic and worldly wise' when seeking to determine the true nature of the relationship.[151]

It is submitted that the *Uber* case expanded the purposive approach applied in Autoclenz[152] – and some have argued that this makes protected status clearer.[153]

The Court of Appeal echoed the reasoning of *Autoclenz.* The Court recognised that there was an imbalance in bargaining power as Uber set the terms which were non-negotiable and were an attempt to avoid offering statutory protection to the drivers.[154] Thus, the Court felt it important to take this realistic and worldly-wise approach to determine whether the written terms reflect reality.[155]

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[144] *Autoclenz* (n139) [17].
[145] Alan Bogg, 'Between Statute and Contract: Who is a Worker?' [2019] 135(Jul) L.Q.R 347, 348.
[146] *Snook v London and West Riding Investments Ltd* [1967] 2 Q.B. 786.
[147] Uber (2018) (n120) [45].
[148] *Autoclenz* (n139) [29]
[149] Ibid.
[150] *Autoclenz* (n139) [35].
[151] Autoclenz (n143) [92].
[152] Atkinson and Dhorajiwala (n138).
[153] Ibid.
[154] *Uber* (2018) (n120) [73].
[155] Ibid [49].

It was the Supreme Court in *Uber* who expanded the purposive approach from *Autoclenz*. Lord Leggatt stated that the 'modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.'[156] This purpose of the statute is now the starting point, and the contract cannot be the starting point. The rights are not contractual rights, but legislative rights. As a result, the Court held that it was the job of the Tribunals to determine whether Uber drivers fit the legislative definition of worker 'irrespective of what has been contractually agreed.'[157] The Court held that the contract could not be the starting point, due to the inequality of bargaining power that exists whereby purported employers set the terms.[158] Furthermore, it was stated that any term of the contract which has been included for the purpose of avoiding rights obligations would be treated as void. Lord Leggatt gave the example that in Autoclenz, the substitution clause had been inserted with the object of excluding the operation of employment legislation.'[159] This is what Bogg described as a statutory purposive approach[160] – asking 'whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.'[161] The Court held that, to determine whether the statute was intended to apply to the drivers in *Uber*, it should look for subordination and dependence.[162] In turn, this is done by analysing the controls present.[163]

This was a step further than the contractual purposive approach taken in Autoclenz.[164] Now, instead of the reality being able to displace any inaccurate contractual terms, the burden of proof has seemingly shifted onto the hiring party to prove that the contract should be given some weight as an indicator of protected status.[165]

[156] *Uber* (2021) (n121) [70].
[157] Ibid [69].
[158] Ibid [76].
[159] Ibid [86].
[160] Alan Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' (2021) L.Q.R. 137(Jul), 392.
[161] *Collector of Stamp Revenue v Arrowtown* [2003] HKFCA 46, [35].
[162] Uber (2021) (n121) [71].
[163] Ibid [75].
[164] Bogg and Ford (n160).
[165] Atkinson and Dhorajiwala (n138).

2.3.1.2 The Purposive Way Forward?

Several commentators have argued that taking the purposive approach endorsed by the Supreme Court in *Uber* has brought clarity to the question of protected status. Davidov had endorsed such a view well before the Court's decision – too citing subordination and dependency[166] as the main indicators[167] that an individual falls within the protective purpose of the statutory provisions.[168] He believes that by taking such a purposive approach, the court can 'avoid technical legalistic application of tests that could be outdated instead looking at the ultimate goal behind labour laws.'[169] Therefore, it seems to stand to reason that the purposive approach helps remove platform workers from protected status no-mans-land by removing the need to apply the explicit wording of the statute and therefore the typical tests of control, personal service and mutuality of obligations. As will be explained in detail in Chapter 3, this combination of tests is unsuited to platform work and causes uncertainty and confusion as to protected status. Instead, we ask whether the purported worker is one of those intended to benefit from the protection of the given statutory labour right.

Alan Bogg believes the law should be developed using this purposive approach to avoid inadequate law being exploited by contracts constructed to avoid obligations to provide basic labour rights .[170] He would, no doubt, welcome the Supreme Court's statement that any clause inserted into a contract by the hiring party, the object of which is to contract out of rights provision, shall be held to be void.[171] In his discussion of personal service and platforms use of substitution clauses in contracts to avoid rights obligations, Bogg claims that the best way to address this 'inadequacy' is to use a purposive approach in which the role of the contract is diminished.[172] Therefore, he believes that to avoid the uncertainty the current

[166] Guy Davidov, 'A Purposive Approach to Labour Law' (OUP 2016).
[167] See also Mark Freeland and Nicola Kountouris, 'The Legal Construction of Personal Work Relations' (OUP 2011).
[168] Davidov (n166). Davidov places greater emphasis on economic dependence as being the most crucial factor to determine worker status, over subordination. He argues that Uber drivers should be classified as employees, as they are subject to both dependency and subordination.
[169] Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach' (2017) 6(1-2) *Spanish Labour Law and Employment Relations Journal* 6.
[170] Alan Bogg, 'Taken for a Ride: Workers in the Gig Economy' (2019) L.Q.R 135, 219.
[171] *Uber* (2021) (n121) [79]-[80].
[172] Bogg (n170).

tests provide, an individual should be characterised as a worker if, on a 'reasonable construction'[173] of the working arrangements, it is possible to do so.[174]

Our analysis in Chapter 1, supports the theory that such an approach would help clarify legal status. We see that the contract plays a significant role in confusing protected status, by creating almost a legal paradox in which it (if it exists at all) explicitly categorises platform workers as self-employed, whilst implementing numerous controls. The statutory purposive approach removes this source of confusion – as the contract is no longer the starting point[175] and it seems will only be considered if the hiring party can show that the reality does in fact reflect the content of the contract.[176]

The result of adopting the statutory purposive approach from *Uber* seems to be that more platform workers will be held by the judiciary to fall within the intended scope of statutory labour rights. To this end, some note that their protected status is now clearer. De Stefano notes that the scope of protection has broadened given the Supreme Court's judgment to the point that it is 'no longer a question of *whether* employment regulation applies'.[177] Atkinson and Dhorajiwala[178] agree that platform workers like those in *Uber* are now likely to be found to have worker status as the scope of protection has now expanded to anyone whose working reality is one of dependence and subordination[179] as opposed to only those who can show that contract did not reflect the true agreement / reality of the platform – platform worker relationship. Typically, the controls placed on platform workers indicate that the relationship is one of dependence and subordination (for detailed discussion see below). It is agreed that the impact of the judgment is to bring more platform workers under the scope of labour law protection.

[173] Ibid.
[174] Alan Bogg, 'The Common Law Constitution at Work: *R (on the application of UNISON)* v *Lord Chancellor'* (2018) 81 M.L.R. 509.
[175] *Uber* (2021) (n121).
[176] Atkinson and Dhorajiwala (n138).
[177] Valerio De Stefano, 'Regulation is not an À la Carte menu: insights from the Uber judgment' (UK Labour Law, March 2 2021) < https://uklabourlawblog.com/2021/03/02/regulation-is-not-an-a-la-carte-menu-insights-from-the-uber-judgment-by-valerio-de-stefano/ >.
[178] Atkinson and Dhorajiwala (n138).
[179] Ibid.

Furthermore, the legislation seems more accessible to platform workers post-*Uber* as the strict tripartite test of control, mutuality and personal service are no longer being considered in the same manner. Instead of being potential bars to finding worker status, the role mutuality and personal service are now in the background, with control used to determine subordination and dependence. While Davidov makes the point that the purposive approach removes irrelevant tests[180], it is noted too that the narrowing of the tests to control removes potential bars to finding worker status – thus making statutory protections more accessible. Some would argue that the impact of this, being that more platform workers are likely to fall under the protected worker category, brings an element of clarity to their protected status.[181]

2.4 Clarifying Status, or Extending the Scope of Protection? The need for Legislation Post-*Uber*

Though the purposive approach is welcomed as a means of increasing the scope of statutory protection and offer labour rights to an increasing number of platform workers - its intentions are too focussed on the scope of protection to bring practical clarity to platform work. Clarity through broadening the scope of protection does not, it is submitted, equate to clarifying the test applied.

Here lies the issue with the points made with regards to clarity in the previous section of this chapter. Though Davidov, Bogg and others believe that the purposive approach, endorsed in *Uber*, is the way forward for platform work – the intention behind this is too fixed on protecting workers when a case fall before the judiciary, to offer an approach which simply clarifies protected status. It is on this basis that *Uber* and the accompanying purposive approach is not a sufficient means of clarifying protected status – and platform-specific legislation should, therefore, be implemented to do so. Davidov himself does suggest that this is the case. He believes that specific regulation with 'clear-cut answers in legislation' would be 'indeed useful to create more determinacy by allowing workers in specific sectors to know their status.'[182]

[180] Davidov (n169).
[181] Atkinson and Dhorajiwala (n138); De Stefano (n177).
[182] Davidov (n169).

This is best illustrated by asking the question: post-*Uber*, does the average platform worker have a clear and certain set of principles by which they can be sure of their rights and obligations vis-à-vis the platform? Simply put, it is argued that the answer is no. There are several reasons for this.

First, the *Uber* decision does not change the fact that protected status, at the start of the platform – platform worker relationship, will still depend on what is agreed on by the parties in the contract.[183] Although the role of the contract is now potentially negligible when placed in front of the judiciary, the purposive approach does not provide a legal framework which, in practice, makes it clear whether the status put forward by the platform via the contract is the true one. In other words, clarifying protected status is still completely 'dependent on the willingness and ability of individual workers to bring claims to the courts.'[184] Dukes argues that this should not be the case and so legislative intervention is required so that the protected status of platform workers is clear without the need to litigate the issue.[185] For example, reversing the burden of proof to assume worker status and shift the onus onto platforms to prove self-employment.[186] As Davidov suggests, a clear, checklist approach to legislation determining protected status would also serve as a means of determining rights and obligations with a reduced need to litigate.[187] Duke's point that certainty of protected status should not rest on an individual's willingness or ability to litigate is further emphasised by the fact that it is unclear how the Supreme Court decision in *Uber* will be applied, until the Tribunals and Courts are faced with new litigation concerning different platforms.[188] Therefore, post-*Uber*, an individual's ability to clarify their protected status rest wholly on their ability to litigate the issue.

[183] Ruth Dukes, 'Regulating Gigs' (2020) 83(1) MLR 217, 221.
[184] Ruth Dukes and Wolfgang Streek, 'Putting the Breaks on the Spread of Indecent Work (Social Europe, March 2021) < https://socialeurope.eu/putting-the-brakes-on-the-spread-of-indecent-work > accessed October 2021.
[185] Ibid.
[186] Ibid.
[187] Davidov (169).
[188] Atkinson and Dhorajiwala (n138).

Second, the clarity of the purposive approach used in *Uber* is limited by the clarity of the purpose selected. It is unclear how the purpose of the statute is found.[189] The Supreme Court suggested that it was parliaments intentions which were being given effect to.[190] However, the chosen purposes were very simple (to protect 'vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment '[191]) and so it is difficult to see how "parliament's" purpose is not really being dictated by the judiciary. Zoe Adams notes that the use of the purposive approach is 'highly political'.[192] In doing so, she makes reference to the Supreme Court's decision in *Royal Mencap Society v Tomlinson-Blake*.[193] The Supreme Court, in this case, denied care workers minimum wage during "sleep-in" shifts, citing that it was never the intention of the National Minimum Wage Act to cover all the times that an individual was subject to the instruction of their employer.[194] However, Adams believes that the Court could have ruled on the contrary, drawing 'on changing social values and/or the cogent and normatively persuasive arguments of the claimants'[195] in a way which would have been 'entirely consistent with the statutory wording, and with some of the other purposes which could legitimately be imputed'.[196] Therefore, in applying the purposive test, the judiciary are making political calls which could reasonably go either way. Such a test, thus, seems unclear. As Dukes notes, it is difficult to see how personal opinion would not make its way into the decision as to the purpose of the statue.[197] This makes it the chosen purpose unpredictable and so too, therefore, is the application of the purposive test.

Third, Adams also notes that inequality in bargaining power remains a factor capable of clouding protected status, even when a purposive test is applied.[198] It forms an important aspect of the purposive test that the judiciary look beyond the written terms agreed in favour

[189] Ibid.
[190] *Uber* (2021) (n121) [76].
[191] Ibid [71].
[192] Zoe Adams, 'One step forwards for employment status, still some way to go: The Supreme Court's decision in Uber v Aslam under scrutiny' (2021) 80 The Cambridge Law Journal 221.
[193] [2021] UKSC 8.
[194] *Royal Mencap* [35].
[195] Adams (n192).
[196] Ibid.
[197] Ruth Dukes, 'Identifying the Purposes of Labour Law: Discussion of G Davidov, A Purposive Approach to Labour Law (2016)' (2016) 16(1) Jerusalem Review of Legal Studies 16(1): 52-67.
[198] Adams (n192)

of analysing the reality of the relationship. Even in Uber's expanded use of the purposive approach, it is the controls exercised by the platform, in reality, which form the basis of the decision. However, in the same way the contractual terms are determined by the platforms, so are the practicalities of the relationship. As a result, a platform could 'avoid labour law obligations by structuring the work arrangement in such a way as to deny workers stability and security of employment *in practice*.'[199]

Fourth, it is submitted that the Supreme Court in *Uber* have not addressed the lack of clarity for the protected status of platform workers caused by the statutory personal service requirement. Despite taking a statutory purposive approach to determine whether Uber drivers were amongst those intended to be within the scope of the relevant statutory rights, there was no discussion of the personal service requirement.[200] This is significant because, as will be explained in Chapter 3, personal service is often a bar to finding that platform workers have legal worker status. For example, in the Deliveroo case, the presence of a valid substitution clause fatal to the rider's claim.[201] Therefore, even post–*Uber*, there is no explicit evidence to suggest that an unfettered substitution clause would no longer be a bar to worker status.[202] This is a question which can only be clarified through subsequent litigation. Thus, the role of personal service remains unclear and so too, therefore, does the question of protected status.

Moreover, case law following the Supreme Court's decision in *Uber* indicates that the statutory triad of mutuality, personal service and control may still be relevant, instead of simply applying control as a mechanism to determine the existence of subordination and dependency. For example, in Addison Lee Ltd v Lange[203], drivers for the platform[204] were found to satisfy the definition of worker set out in s230 of the Employment Rights Act 1996 and related provisions in the Working Time Regulations 1998 and the National Minimum

[199]Zoe Adams, 'Labour Law and the Labour Market: Employment Status Reconsidered' (2019) 135 L.Q.R 611.
[200] Connie Cliff, 'The Supreme Court and Uber: Taxi for the Gig Economy? (2021) 32(3) PLC Mag. 7.
[201] *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* [2021] EWCA Civ 952.
[202] Cliff (n200).
[203] Addison Lee Ltd v Lange & Ors [2021] EWCA Civ 594.
[204] Addison Lee provide a range of private-hire vehicle services. See <https://www.addisonlee.com/services/about/>

Wage Act 1998. Similarly to *Uber*, the question was one of whether an overarching contract existed between the drivers and the platform for the provision of work. The Tribunal found that such a contract did exist, a decision which seems in keeping with *Uber*. The Court of Appeal, in its post-*Uber* refusal of Addison Lee's permission to appeal, did to some extent acknowledge the Supreme Court's extension of the purposive approach – stating that to determine whether the drivers were workers was a question of 'interpreting a statute rather than interpreting a contract'.[205] However, at no point in the judgment were the words 'subordination' or 'dependency' used, and the there was no mention of statutory purpose. Consequently, it seems as though the wording of the Employment Rights Act 1996 was being applied to determine protected status, instead of the purpose of the National Minimum Wage Act and Working Time Regulations. Doing this means that the current statutory tests still have a role to play post-*Uber*. These tests are deeply unsuited to platform work and prohibit platform workers from having clarity as to their protected status (for reasons explained in depth in Chapter 3).

The final factor precluding the use of a statutory purposive approach to clarify the protected status of platform workers is that it places great weight on control – which is itself not a test that is consistently or predictably applied by the judiciary. The following section will elaborate on this by highlighting the issues with the Supreme Court's approach to control in *Uber* – which ultimately lacks clarity and consistency in its long-term application meaning platform workers, going forward, cannot use it to determine with certainty their protected status.

This section has sought to demonstrate that, despite the belief of many commentators that a purposive approach eliminates the need to legislate if we wish to clarify protected status – the combined statutory and contractual purposive approach taken has not brought such clarity. It is a welcomed decision from a protective stance, as it appears to have paved the way for more platform workers to be found to fall within the scope of statutory labour protections.[206] However, increasing the scope of rights does not equate to clarifying status. Several questions remain over the application of such a test with prohibit its use as a clear, consistent test which can be used to make platform workers certain of their protected status.

[205] *Addison Lee* [12]
[206] Atkinson and Dhorajiwala (n138).

These issues include the remaining need to litigate, the source of the statutory purpose and the continued inequality in bargaining power. Moreover, the wording of the statute and the tripartite test, which is applied as a result, remains relevant. These tests are so unsuited to platform work, that whilst their application remains possible, the protected status of platform workers cannot be determined with certainty (see Chapter 3).

2.5 Controlling Control – The Uncertain Judicial Application of Control

It is argued that the test for control, as applied throughout the *Uber* litigation, is rife with uncertainty with respect to how its application varies from case to case. Therefore, it appears as though the judiciary in *Uber* have not provided a clear test capable of clarifying the protected status of platform workers – and so legislation is still required to do so.

To demonstrate this point, we must first understand the approach taken to the requirement of control, throughout the various stages of the litigation.

2.5.1 How Control Developed Through *Uber*

The working conditions in which Uber drivers carried out their rides also played a key role in the Tribunal's reasoning. Good topic sentence. In reality, these conditions did not correspond with the written agreement.[207] It is clear from the Tribunal's analysis of the realities of the relationship that it was Uber who were the central service provider, in control and overseeing the provision of the rides. Given the realities, it was clear that Uber expected the drivers to be at its disposals to provide transport services on its behalf. In no way was Uber acting as an agent working for the drivers.[208] To support this, the Tribunal pointed towards 13 various factors, including the fact that Uber interviewed and recruited drivers, controlled information which is key to each ride, such as customer names and destinations. They also logged off drivers who did not complete a required percentage of trips, they set the fares, routes, implemented ratings systems to monitor driver performance, handled complaints and also accepted the risk of loss which the Tribunal felt would fall upon the driver should they truly

[207] *Aslam* (n118) [90].
[208] Ibid [92].

be in business for themselves[209]. All of these factors represent ways in which Uber was in control of the service providing rides for customers and ultimately pointed towards the drivers being employed as 'workers' for Uber.

As well as these controls over the process of providing each ride being indicative of worker status, the Tribunal also held there was no opportunity for a driver to take on the role of an independent businessperson. For example, a driver is given no room to negotiate with their passengers and are left with no means of growing as an independent business as any contact with any passengers post the completion of the ride is banned by Uber. The only means by which a driver can grow their so-called independent business would be to work longer hours on the app.[210] It is for these reasons that the Tribunal felt that, when driving, the Uber drivers were doing work for Uber, not as an individual business undertaking.[211] The agreement between Uber and their drivers was not one between two independent business, but for the drivers to agree to provide their services for Uber.[212] Therefore, the Tribunal came to the conclusion that Uber drivers were in fact workers who had access to the minimum wage and paid sick leave which formed the basis of their claim against Uber.

The EAT understood that the key to Uber's case was their belief that the ET had not properly understood the nature of the relationship between Uber and Uber drivers.[213] However, the EAT found that the ET has not in fact erred in law when determining whether Uber drivers are employed as workers by Uber. They were will within their rights to disregard the written terms and to determine the true nature of relationship, by considering all the relevant factors, as a starting point.[214] This is consistent with the earlier decision in *Autoclenz.*[215] As a result, the ET did not erred by rejecting Uber's agency argument. The EAT supported each stage of the ET's reasoning in coming to their conclusions. This includes the factors relating to Uber's marketing[216], as well as their control over the drivers. The EAT noted several controls which

[209] Ibid [92].
[210] Ibid [90].
[211] Ibid [93].
[212] Ibid [94].
[213] *Uber* (2017) (n119) [104].
[214] Ibid [105], [109].
[215] *Autoclenz* (n139).
[216] *Uber* (2017) (n119) [110].

the ET had been well within their rights to assess as part of their efforts to determine the true nature of the relationship. These include Uber's interview and induction process, the fact they withhold customer information from drivers and handle the complaints procedures, their indemnification for drivers against fraud or cleaning costs, their warnings to drivers who accept less than 80% of trips, their deactivation of accounts belonging to those who do not achieve high enough star ratings or decline three trips in a row, and their control over the route taken.[217] For these reasons, the ET had been correct to disregard the written terms in favour of finding that Uber drivers are hired as workers by having regard to all the realities of the relationship between the drivers and Uber.

The Supreme Court unanimously agreed that the drivers are workers and believed that there were five particular factors which were significant indicators of this. First, and described as carrying 'major importance'[218] is the fact that an Uber drivers pay is fixed by Uber and there is no room for negotiation. Each fare is calculated by Uber and is taken wholly out of the driver's control. For example, any discount would have to come from their own pocket. Uber also have control over refund policy and determine whether a partial or full refund should be given in the event that a customer has had a poor experience.[219] Uber's control over remuneration and all other financials matter represents a strong indicator of subordination and thus worker status, according to the Court.[220]

Second, Uber had complete control over the terms agreed between themselves and the drivers, leaving the drivers with no say on the matter. This also included provisions which governed the way in which drivers must provide the transport service to the customers. This indicated that the drivers were hired as workers, working for Uber.[221]

[217] Uber (2017) (n119) [113].
[218] Uber (2021) (n121) [94].
[219] Ibid.
[220] Ibid.
[221] Uber 4 [95]

Third, despite Uber contending that all work is completely flexible and without obligation, they do in fact place strict constraints on a driver's choice to accept or reject rides.[222] The Court believed that Uber did this in two main ways. First, by controlling the information pertaining to each ride. A driver must choose to accept or reject a ride with only extremely limited information. They are given a pick-up point and the customer's star rating meaning they can make the choice to reject a ride on the basis of start location or if they wish to avoid a potentially troublesome passenger with a low star rating.[223] All other information including the customer's name and destination are hidden, leaving a driver with little information with which they can make the decision to accept or reject the ride.[224] Second, drivers are given warning and penalties should their acceptance rate fall below the required threshold. This includes being shut out of the app for a ten-minute period.[225] This is akin to docking a drivers pay as it prevents them completing any further rides for that period, and the Court believed this was a clear example of subordination indicative of worker status.[226]

The fourth factor highlighted by the Supreme Court was Uber's significant degree of control over the way in which drivers deliver their services.'[227] Despite Uber drivers owning their own vehicles, Uber vets the types of car that can be used.[228] The technology behind Uber is paramount to the service it provides, and this is also something that Uber uses as a form of control over the drivers. Drivers are told a route they must follow by the app and bear the financial risk of deviating from that route.[229] Furthermore, the app features a star rating system whereby drivers are awarded a rating out of five for each ride. Whereas most rating systems are used as a guide to help a potential customer make an informed decision between a choice of services, the Court noted that Uber use ratings differently. Instead, they are used as an 'internal tool for managing performance'[230] and can be used as a means of justifying

[222] Uber 4 [96]
[223] Ibid.
[224] Ibid.
[225] Ibid [97].
[226] Ibid.
[227] Ibid [98].
[228] Ibid.
[229] Ibid.
[230] Ibid [99].

termination. This was described by the Court as a 'classic form of subordination that is characteristic of employment relationships.'[231]

The final significant factor to suggest that the drivers were employed as workers by Uber was the manner in which Uber restricted communication between the drivers and customers. Absolutely none of the passenger's contact details were passed from Uber to the drivers, and drivers were explicitly prohibited from exchanging contact information with any passenger unless it is to help return lost property.[232] Moreover, the systems which deal with ride fares, driver payment and complaints were all set up to be dealt with by Uber, preventing contact between a customer and drivers.[233] The impact of this is to prevent a driver from being to create any relationship with a passenger that goes beyond the ride facilitated by Uber.[234] In other words, a driver has no opportunity to perform any trade with any of these customers independently of Uber, as Uber guarantee that the relationship ends as soon as the customer leaves the drivers vehicle. The drivers, therefore, were not operating a business of their own account.

2.5.2 Deficiencies in the Control Test

If we look at the reasoning of the Tribunals and Courts in *Uber*, it becomes apparent that we still lack a test for control consisting of definite criteria, which could be brought by legislation. There remains some disparity between the judgments at each stage insofar as different factors are considered as carry varying weights of significance as indicators of worker status.

The basis of Duke's argument for legislation is that one should not need to litigate in order to benefit from labour rights – instead the law should be sufficiently clear so as to guide the parties and allow all to be aware of their rights and obligations.[235] However, we see from the approach to control in Uber that this is not possible, as there is no unified set of principles which are being analysed to determine control. Instead, the controls being analysed are those

[231] Ibid.
[232] Ibid [100].
[233] Ibid.
[234] Ibid.
[235] Dukes and Streek (184).

the judiciary see as most pertinent to the facts of that case – in other words, it is analysed on a case-by-case basis. The result of this is that although we have a rough idea of what the courts are looking for, we still cannot say with any certainty what the outcome of each individual case will be.'[236]

The ET ruling focus much or their attention on dispelling Uber's agency argument. However, in demonstrating that the drivers were workers in reality, they highlighted 13 different factors.[237] The EAT agreed that each of these factors were rightly used to conclude that the drivers were workers. The Court of Appeal then removed one factor, Uber assuming the risk any fraud, as it was held the ET overstated the importance of this point.[238] The Supreme Court amalgamated many of these into five broader factors of particular importance, namely payment, the imbalance in bargaining power, the restraints on job acceptance and rejection, the control over how the service is provided and the restriction over driver – passenger communication.[239] These factors seem to effectively take into account the common methods of control implemented by platforms. Therefore, some combination of these factors would, arguably, be an effective means of indicating worker status in any platform work case. However, the Supreme Court stopped short of narrowing the control test down, universally, to these five factors meaning that control remains an open-ended test applied case-by-case.[240] Such an open-ended list only serves to 'increase confusion, over-mechanical application, and subjectivity' prohibiting a clear and concise test.[241] Research in the USA has shown that a multifactor test of even 8 factors impairs a judge's ability to simultaneously weigh those factors effectively.[242] It thus follows that strictly defining the factors considered, to those most pertinent to platform work, would make judicial decisions more predictable with respect to determining the protected status of platform workers.[243]

[236] Lynn Marr, 'Worker status: the story so far and the next chapter' [2019] 154 Emp. L. B. 2.
[237] *Aslam* (n118) [92]-[113].
[238] *Uber* (2018) (n120).
[239] *Uber* (2021) (n121) [90]-[95].
[240] For example, see Johnson v Transopco UK Ltd [2022] EAT 6 [89].
[241] Jennifer Pinsof, 'A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy' (2016) 22 Mich, Telecomm & Tech. L. Rev 341.
[242] Barton Beebe, 'An Empirical Study of the Multifactor Tests for Trademark Infringement' (2006) 94 Cal. L. Rev. 1581, 1646.
[243] Pinsof (n241).

The Supreme Court in *Uber* have also not established a threshold which must be met to satisfy the requirement – in other words: what is "sufficient" control? Given that control is currently only defined by a non-exhaustive list of relevant factors on a case-by-case basis, the threshold required to satisfy the requirement is unclear. Legislation to limit the control test down to a small number of factors would also bring the opportunity to define the amount of control necessary. For example, as Chapter 4 will explore, by stating that the presence of any control is sufficient to find worker status.[244] This would remove the unpredictable balancing act done by the court case-by-case, to give a quantifiable threshold needed to satisfy the control requirement.

The Supreme Court decision in barely one year old, so it stands to reason that some gaps in the literature concerning the decision may exist. It is submitted that one significant gap highlights the judiciary's inability to clarify protected status – and even suggests that the Supreme Court has made the test for control even less predictable. This gap in the literature relates to the Supreme Court's treatment of the five controls it highlighted as being indicative of worker status – and it is argued that the way in which the Court treated these controls has only confuses the requirement of control further.

There is confusion, given the Supreme Court's application of the control test, as to whether some aspects of control weigh heavier in favour of finding worker status than others. Previously, relevant controls were taken case by case and assessed by the court. However, the Supreme Court in *Uber* went a step further to suggest that a hierarchy may exist, with control over remuneration being the most significant indicator of control suggesting worker status as Lord Leggatt specified that this was 'of major importance'[245] The decision did, however, stop short of indicating where the other of the five factors listed would fall in such a hierarchy.[246] Moreover, the decision does not exclude the possibility that other factors, which may not have been relevant in *Uber* but may be pertinent in other cases, would be able to match control over remuneration in any hierarchy. Therefore, the already unpredictable

[244] See Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020).
[245] *Uber* (2021) (n121) [94].
[246] Ibid [96] – [100].

balancing act done by the judiciary becomes even more unpredictable – as it is unclear which elements of control will weigh heavier than others.

Another unique take on the decision would be to say that not only does this potential hierarchy cause confusion, but the origins of that hierarchy give it the potential to confuse the test for control even further. As we have seen, a statutory purposive approach was amongst the foundations for the Supreme Court's decision.[247] Therefore, the purpose of the statutes in question is central to the decision. Amongst what the Court felt was the purpose of the relevant statutes in *Uber*, was to 'protect vulnerable workers from being paid too little for the work they do'.[248] It, thus, follows that this purpose dictated the controls considered by the Court, and at the heart of the Court's declaration that control over renumeration was the factor 'of major importance.' If the Court seeks to apply the purpose of the statue, and the purpose of the statue is to prevent underpayment, then subordination/dependency in relation to pay does seem to be pertinent. The supposed purpose of the statute led the Court's move towards suggesting that a hierarchy of control exist – with control over pay being the most important in this case.[249] Yet, this is deeply problematic for the clarity of protected status. Because not only do we not have a specific set of criteria to examine, but we also have a hierarchy of controls which changes case-by-case, depending on either a) the combination of relevant statues and b) what the court perceives the purpose of these statutes to be.[250] There is no doubt, that this creates an inconsistent and unpredictable outlook for the control test, which seemingly can only ever be determined through litigation on a case-by-case basis. We have, for example, seen that deciding upon the purpose is necessarily a consistent process.[251] Drawing on Duke's earlier reasoning, legislation is necessary to strictly define control and avoid this unpredictable case-by-case approach which sees the test change depending on the statutory right in question – only this way can we clarify protected status.[252]

2.6 Conclusion

[247] *Uber* (2021) (n121) [71].
[248] Ibid.
[249] Ibid [94].
[250] Dukes (n197).
[251] Ibid.
[252] Ibid.

Uber has not clarified the protected status of platform workers. The Uber decision is a welcome one in that it has seemingly brought more platform workers under the scope of statutory protection. However, this does not equate to clarity of protected status. The Supreme Court's use of a contractual and statutory purposive approach brings several issues to the clarity of protected status. It does not remove the need to litigate to obtain worker rights[253] and it is unclear exactly how the purpose of each statute is being determined, and it is argued that this cannot be applied consistently, in a way which means platform workers can be certain of their protected status.[254] Moreover, the *Uber* decision applies the control test in a way which can only be applied case-by-case, without certainty. The open-ended list of potential factors which may be considered, means we cannot know with certainty the outcome of any case.[255] Finally, the potential hierarchy of control suggested by the Supreme Court, makes weighting of the various controls unclear, and therefore we cannot predict how the Court would approach the act of balancing controls to determine protected status. if the hierarchy is determined by the purpose of the statutory right in question, then the hierarchy, and thus the test for control, could change case-by-case, again making it impossible for platform workers to be clear of their protected status.

Chapters 2 and 3 make the case for legislative reform. This chapter has sought to show that one, ground-breaking decision, that of the Supreme Court in Uber, has not brought clarity to the protected status of platform workers, and therefore legislation represents the only means of achieving this aim. Chapter 3 seeks to strengthen this claim by illustrating that not only have the judiciary in *Uber* not clarified protected status, but it is not possible for any judicial decision to do so, because of the serious deficiencies found in the statutory tests which must be applied to determine protected status. In such a case, legislation is the only remaining route to clarity.

[253] Dukes (n184)
[254] Adams (n192).
[255] Marr (n236).

CHAPTER 3: THE CASE FOR LEGISLATIVE REFORM

3.1 Introduction

The involvement of the judiciary is unavoidable regardless of whether legislation to clarify the protected status of platform workers is enacted. When, inevitably, disputes arise and are litigated, it is the judiciary who interpret and apply the relevant legislation.[256]

As Chapter 1 explained, a statutory definition of worker can be found in section 296 of the Employment Rights Act 1996. That is to say that a worker is someone who works under a 'contract ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.'[257] The judiciary have since broken this definition down into three requirements, namely mutuality of obligation, personal service, and a lack of an independent business undertaking[258] (control).

This chapter seeks to demonstrate that in applying the current tests for worker status, which originate from the statute, to cases involving platform work, we are trying to fit square pegs into increasingly round holes.[259] When we look further into each of the three elements which are needed to find worker status, we see that these tests are unsuitable as a means of distinguishing platform workers who merit legal worker status, with those who are genuinely self-employed. This creates an uncertain environment in which platforms and platform workers cannot be certain of their obligations. The judiciary have no option but to apply the relevant statute. Therefore, statutory change is required to bring clarity to the protected status of platform workers. Starting with control, we see the issues caused by the current tests, when applied to platform work.

[256] Luca Deon, 'Regulating the scope of employment in the gig economy: towards enhanced rights at work in the age of Uber' (2020) LSELR 5 190.
[257] ERA 1996 S230(3).
[258] Guy Davidov, 'Who is a worker?' (2005) ILJ 34, 57.
[259] Michael Doherty and Valentina Franca, 'Solving the 'Gig-saw'? Collective Rights and Platform Work' (2019) 49(3) ILJ 352.

3.2 Control

Control has been used as the mechanism by the courts to determine whether an individual is carrying out an independent business undertaking. In this sense, it is perhaps the least controversial in terms of its applicability and relevance to platform work and determining protected status. Given the nature of the platform – platform worker relationship described in previous chapters, we can see that control is an important element of the relationship between platform and platform worker.[260] Therefore, it should play a role in determining protected status, to differentiate between the genuinely self-employed, and those meriting basic labour law protections.

There has been debate, however, as to whether control should be a factor used to distinguish between self-employment and classification as a worker. Davidov believes that dependency forms the key rationale behind the application of labour rights. As a result, the focus of the court's analysis should be whether 'the putative worker was in a position of dependency on the relationship with the specific employer, thus being in need of protection.'[261] Freedland has taken a similar position, arguing that the test for worker should identify those who are in a 'semi-dependent' work relationship.[262] While employees should be dependent upon their employers, workers must too, but to a lesser extent.[263] This echoes the logic of the decision in Byrne Bros.[264] When identifying supposed workers in this way, control is no longer a relevant factor. Although control is a strong indicator of existing democratic deficits, it is not pertinent to determine whether an individual is dependent on a specific employer.[265] This does not, however, appear to be a relevant test for platform workers. Many do not rely on platform work on their primary source of income and are less dependent on the platform.[266]

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[260] See Miriam A Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 COMP LAB L & POL'Y J 577 ; Sarah Kessler, 'Pixel & Dimed On (Not) Getting By in the Gig Economy' (*Fast Company*, 18 March 2014) <https://www.fastcompany.com/3027355/pixel-and-dimed-on-not-getting-by-in-the-gig-economy> accessed 20 December 2019.
[261] Davidov (n258) 70.
[262] Mark Freedland, 'The Personal Employment Contract' (OUP,2003) 23.
[263] Ibid.
[264] *Byrne Brothers (Formwork) Ltd v Baird* [2002] ICR 667, [2002] IRLR 96.
[265] Davidov (n258).
[266] Ryan Calo and Alex Rosenblat, 'The Taking Economy: Uber, Information and Power' (2017) 117 Colum. L. Rev 1623.

Meanwhile, others are more dependent on platform work. A dependency approach could, therefore, lead to a confusing landscape in which individuals working for the same platform, are classified differently. As a result, in the case of platform workers, a dependency approach would not provide clarity to determining protected status.

Hugh Collins has also criticised the current tests to determine protected status, including the requirement of control.[267] He believes that should control be considered, it must be 'understood to mean that there is a right to control.'[268] Although Collins does not elaborate on what is meant by a 'right to control', this seems to imply that the crucial factor is subordination – suggesting that the presence of control is not necessary to find worker status, but simply the possibility that control could be enforced is sufficient, given the nature of the relationship between the supposed employer and subordinate worker. However, he takes the view that control alone cannot be a reliable test for protected status 'because it is possible to provide by contract for detailed managerial controls over genuine independent contractors'[269] as well as over those classified as employees and workers. His logic appears to be that the parameters defining and differentiating each category should comprise of elements which are unique to either self-employment, worker status, or employee status. Thus, Collins does not see control as being indicative of any particular status.

The issue with these suggestions is that they are not coming from a platform specific viewpoint. When we take this perspective, control does become a crucial factor to determine protected status. Collin's view that the test must be capable of uniquely defining each category actually supports the use of control as a means of clarifying the protected status of platform workers. As Chapter 1 has demonstrated, it is the combination of flexibility and control, along with the fact that work is assigned through online platforms, which distinguishes platform work as unique. As a result, control should be an important factor to determine whether a platform worker benefits from basic labour law protections. The presence of control would likely distinguish between a platform worker who should benefit from those protections, and one who is genuinely in business for themselves. From a

[267] Hugh Collins, A Missed Opportunity of a Unified test for Employment Status' (UK Labour Law, 31 July 2018) < https://wordpress.com/view/uklabourlawblog.com > accessed January 2021.
[268] Ibid.
[269] Ibid.

standpoint which focuses solely on platform work, looking for the presence of control is not an outdated means of determining protected status.

Bogg shares the view that control should be at the forefront of the test determining protected status. He believes that control should be assessed by the courts 'as a proxy for subordination, dependence and, vulnerability to exploitation.'[270] Typically, these factors are used as a means of determining whether an individual is genuinely in business for themselves, or whether they are employed as a worker of employee.[271] It is noted that, in *Uber*, control was used to establish whether a contract existed between Uber and the drivers.[272] Given the high level of controls present, Uber drivers were held to be hired as workers to perform services for Uber. Bogg believes that this is the lens through which all elements of the test for worker status should be assessed.[273] Again, given the importance of control on the nature of the platform – platform worker relationship, it should play a central role when protected status in determined.

Although it should remain relevant to determine the protected status of platform workers, the control test is flawed and must be altered to allow it to be applied consistently and with certainty. It is submitted that legislation is required to reform the control test into one which provides a clarity currently lacking in the judicial discourse. The reasons for this were submitted in the previous Chapter during discussion of the *Uber* case. That is, that we lack a definitive list of factors the court would consider relevant to control – meaning too many controls may be simultaneously weighed when determining control for a platform worker to look at the reality of their relationship with a platform and be clear as to their status.[274] Moreover, we lack a quantifiable threshold by which control is judged. Again, without such a qualification, a platform worker would be unclear as to whether or not they are under "enough" control to have worker status. Chapter 2 also addressed the potential hierarchy

[270] Alan Bogg and Michael Ford QC, 'The death of contract in determining employment status' (2021) LQR 392.
[271] Ibid.
[272] Ibid.
[273] Ibid.
[274] Jennifer Pinsof, 'A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy' (2016) 22 Mich, Telecomm & Tech. L. Rev 341.

established by the Supreme Court in *Uber*.[275] This too creates uncertainty regarding the application of the control test.

Post-*Uber* case law has shown that questions around control also remain even after the Supreme Court's decision. In *Johnson v Transopco*, a taxi driver who operated a black cab, regulated by Transport for London, also used a ride hailing app as a means of finding passengers.[276] Unlike in *Uber*, the app did not set the fares and payment could be made either via the app (which took less than a 10% cut) or directly to the driver. The app gave drivers the name and location of the passenger before accepting the ride and facilitated direct contact between them by exchanging their phone numbers. The app did, however, make use of a star rating system (although there was no consequence of a low-rating, unlike in *Uber*), and handle the complaints procedure. It was also possible for drivers to cancel (or "scrub") trips at any time – but they would be warned, or suspended, if more than ten rides were scrubbed.[277] The ET and EAT both held that this was insufficient control to find worker status, and found the drivers to be self-employed for the purpose of receiving minimum wage, holiday pay, unlawful deduction from wages and whistleblowing protection.[278] The main form of control present, namely the potential reprimand over scrubbed rides, was seen as insufficient when weighed against the other factors and the need for the app to protect its own reputation.[279] Perhaps it is fair to say that, in this case, the driver was operating as an independent contractor. However, the outcome does highlight the unpredictable, case-by-case approach to control taken by the tribunals and the court. It was stated several times within the decisions that control is fact-specific, and *Uber* was not a 'panacea' for all platform work cases[280]. It is argued that the framework must be changed to avoid this and provide some clarity for platform workers. An open-ended list of factors was taken into consideration, with little indication as to how much more control would have been necessary to find worker status. We cannot see where the line is drawn, and insufficient control becomes sufficient control to find worker status. The reality is, without legislative intervention, this line will never be clearly drawn.

[275] *Uber BV v Aslam* (2021) UKSC 5 [94].
[276] Johnson v Transopco UK Ltd [2022] EAT 6.
[277] Ibid [7]-[18]
[278] Ibid [84]
[279] Ibid [27]
[280] Ibid [89]

It is argued that legislation would have the potential to answer the questions raised which currently prevent the clear and consistent application of the test for control. It may be argued that the judiciary can provide a definitive list of factors which clarifies the burden required to satisfy the control test and offers a clear hierarchy of control indicators. Though this may be true, the judiciary did not take the opportunity in *Uber* to do any such thing beyond the indication that some hierarchy may exist. In fact, the Supreme Court's half-measure hierarchy could be taken as a hint that the legislature should intervene to clarify the test. Underhill LJ's dissent in the Court of Appeal certainly suggested that the power of the judiciary is limited creating tests which would apply to platform work cases beyond *Uber.*[281] Given that the judiciary passed on the opportunity to clarify the control test in *Uber*, legislation seems the only likely means through which the test could be clarified. There is no doubt that control should remain central to determine whether a platform worker is indeed a worker, or whether they are an independent contractor. However, this is a test in need of reform in the shape of legislative direction for its application.

3.3 Personal Service

To satisfy the legal definition of 'worker', an individual must be obliged to perform work personally. It is argued that this should not be a relevant factor to determine the protected status of platform workers.

Commentators have pointed to the personal service requirement as being out of date and not reflective of the modern labour market. Collins again takes the view that personal service cannot be a central factor to distinguish between those employed as workers and those who are self-employed.[282] The rationale for this is again that someone who is self-employed may

[281] *Uber BV v Aslam* [2018] EWCA Civ 2748 [166] : 'Even if it were open to the courts to seek to fashion a common law route to affording protection to Uber drivers and others in the same position, I would be cautious about going down that road.' (Underhill LJ)
[282] Collins (n267).

contract to perform work personally and not permit substitutions.[283] Thus, personal service does not necessarily distinguish workers from independent contractors.

Bogg supports the notion that the current application of the test for personal service is outdated. He highlights the use of substitution clauses as the main reason behind this.[284] The *Deliveroo* case successfully demonstrates the issues created by substitution clauses in platform worker contracts. Specifically, how the flexible nature of platform work can be exploited to negate any responsibility for the provision of basic labour rights.

Deliveroo is an online food delivery service. Users log on and use their location to find local restaurants offering take-away services. It is then possible to use the Deliveroo app to order food from those nearby restaurants, pay for it, then have the food delivered directly to their door. Deliveroo relies on its own army of delivery riders to meet the customer demands for food left on their doorsteps. These Deliveroo riders are often seen on bikes around cities and are trackable via the Deliveroo app making it possible for customers to see exactly how far away their food is as well as the name of the rider and their mode of transport. [285]

The Deliveroo contract states that their riders are self-employed.[286] As a result, Deliveroo riders are denied access to any labour law protection. Notably in this case, that also includes the right to collective bargaining. However, an application was made by the Independent Workers' Union of Great Britain (IWGB) to be recognised for collective bargaining by Deliveroo. The application was made to the Central Arbitration Committee (CAC) and subsequently refused.[287] The CAC did not believe that Deliveroo Riders satisfied the definition of worker set out in section 296 of the Trade Union and Labour Relations (Consolidation) Act 1992[288] and therefore should not have the right to union activity.[289] The Deliveroo Rider contract affords Riders a right to substitution, and given that the Committee found this to be

[283] Ibid.
[284] Alan Bogg, 'Taken for a Ride: Workers in the Gig Economy' (2019) L.Q.R 135, 219-226.
[285] See < https://deliveroo.co.uk >
[286] 'Deliveroo Scooter Contract' (*Parliament UK)* < https://www.parliament.uk/documents/commons-committees/work-and-pensions/Written_Evidence/Deliveroo-scooter-contract.pdf> accessed 20 December 2019.
[287] *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* [2017] 11 WLUK 313
[288] Trade Union and Labour Relations (Consolidation) Act 1992, s296.
[289] *IWGB* (n287).

a genuine right, they concluded that Deliveroo Riders are under no obligation to perform work personally, and thus do not satisfy the s296 TULRCA 1992 definition of worker.[290] The CAC accepted oral evidence of the clause 'being operated in practice'[291] and were further convinced by the fact that a Rider 'can even abandon the job part way having only to telephone Rider Support to let them know'.[292] It was noted that the inconveniences associated with utilising the substitution clause, such as having to give a personal mobile device or Deliveroo log-on passwords to another person, 'limits (the) attractiveness'[293] of such a clause. However, 'that does not make it a sham'.[294] Consequently, the requirement of personal service was not met, and worker status could not be found.

The decision has subsequently been upheld by both the High Court[295] and the Court of Appeal[296] (although the point of appeal was, for both courts, the interpretation of Article 11 ECHR and not analysis of the worker definition).

Bogg has described the current application of the test for personal service as being 'defective'.[297] The issue stems from the fact that an individual may fail to reach the necessary threshold to satisfy the requirement simply due to the existence of a single clause in the contract. Bogg states that 'a legal rule that treats the mere existence of a valid contractual term as a conclusive negation of worker status is … tantamount to permitting contracting-out of employment protection.'[298]

What Bogg describes as 'contracting-out of employment protection' is precisely what happened in *Deliveroo*. The existence of the substitution clause was, alone, sufficient for the tribunal to rule that the riders were independent contractors. It is argued that the substitution clause used in that case demonstrate that the legal framework is even more 'inadequate' than Bogg suggests. This is because the current framework does not just allow a single substitution

[290] Ibid [101].
[291] Ibid.
[292] Ibid.
[293] Ibid [102].
[294] Ibid.
[295] [2018] EWHC 3342 (Admin)
[296] [2021] EWCA Civ 952
[297] Bogg (n284) 221.
[298] Ibid.

clause to negate worker status – but this remains true even when using the clause would be impractical for the platform worker. The CAC in *Deliveroo* acknowledge both the impracticality of the clause and the infrequency with which it is used by the Riders.[299] It would mean a Rider either gives their own mobile device to someone else, or trusts them with their secure log-on details.[300] Moreover, as Deliveroo Riders are under no obligation to accept work, this poses the question as to why a Rider would bother to use a substitute if they cannot do the work themselves.[301] It is, therefore, argued that the personal service requirement gave Deliveroo the opportunity to make a "smart" business move by including the substitution clause to deny their Riders worker status and keep costs low. This exposes an issue with the current legal framework, allowing a substitution clause which is neither practical, nor often made use of – to completely negate worker status. *Deliveroo* has shown that even post-*Uber*, it is still possible, as Bogg suggests, to manipulate a contract in order to indicate self-employment.[302] In which case, we are left with a confusing situation in which platform workers appear to be under sufficient control to satisfy the worker definition but are contractually denied such status by the presence of a substitution clause. Only enacting new legislation which removes the requirement that work is done personally can rectify this in order to clarify the protected status of platform workers.

Although it is perhaps not a "sham" clause, impractical substitution clauses such as that which proved fatal to IWGB's claim in *Deliveroo*, seem almost akin to a "sham". It is argued that they should be treated as such, as accepting them as legitimate supports the likes of Deliveroo, who can exploit this apparent loophole to avoid the obligations which would come if the Riders were found to have legal worker status. Platforms should not be allowed to circumvent the law to avoid their obligations.[303] As Prassl notes, that would be a successful effort to 'divorce the fundamental entrepreneurial trade-off inherent in fully functioning markets: cost and risk are shifted onto workers, whilst the intermediaries get to enjoy the profits.'[304] In

[299] Ibid.
[300] Ibid.
[301] Deon (n256).
[302] Ruth Dukes, 'Regulating Gigs', (2020) M.L.R. 83(1), 217-228.
[303] Hilary Hogan, 'Rewinding the Clock: Workers' Rights in the Gig Economy' (2020) 9 King's Inns Student L Rev 114, 127.
[304] Jeremias Prassl, *Humans as Service* (OUP, 2018) 86.

other words, the current test presents the opportunity for platforms to increase profits, to the detriment of their workers.

The *Deliveroo* and *Autoclenz* decisions illustrate further unpredictability facilitated by the statutory requirement that work is done personally. Whilst Deliveroo Riders were classified as independent contractors, the valets in *Autoclenz* were found to be workers.[305] The difference between the substitution clauses in these cases was the possibility to actually make use of the clause. In *Autoclenz*, the valets were both unaware of their right to substitute and had never made use of the clause.[306] In Deliveroo, evidence showed that although the vast majority had never utilised the substitution clause, some had.[307] This was enough to prove that the clause was not a "sham". It is extremely unclear whether the outcome in *Deliveroo* would have been different should there have been no evidence that any Rider made use of the substitution clause. Given that such small details make the material difference to the outcome of each case, it seems impossible for the judiciary to create a set of principles which means the law could be interpreted uniformly[308] across platform work cases. The result is that the outcome of each case is shrouded in uncertainty, and platform workers are left not knowing the true extent of their obligations and rights.[309] Thus, it seems that only new legislation could provide certainty to this situation.[310]

Moreover, the personal service requirement has no place in the test to determine the protected status of platform workers, as the nature of such work leaves it particularly open to the exploitation by substitution clauses described above. Platform work is flexible and usually involves low-skilled work.[311] This makes it possible that, in reality, anyone could take over and perform the work on behalf of another. This makes it easy for platforms to insert "legitimate" rights of substitution into the contracts. It seems, for example, that it would be much easier to convince a court that a clause allowing anyone to deliver food is valid, than a similar clause for a surgeon performing a major operation. The diversity of the labour market

[305] *Autoclenz Limited v Belcher* [2011] UKSC 41.
[306] Ibid.
[307] *IWGB* [2017] (n287) [80].
[308] Dukes (n302)
[309] Lynne Marr, 'Worker status: the story so far and the next chapter' [2019] 154 Emp. L. B. 2.
[310] Dukes (n302)
[311] Cherry (n260)

calls for platform specific tests to prevent the exploitation of the nature of the work as seen in Deliveroo. As Finck explains, the current tests are out of date and unsuited to the emergence of online work. [312]

Allowing platforms to cast doubt on the protected status of platform workers (and deny their access to basic labour rights) by using substitution clauses frustrates the purpose of the statutes enacted to protect working people. Adams rejects the relevance of the current tests, instead favouring a purposive approach to determine protected status.[313] She believes that the statutory labour rights are in place to 'protect those being paid too little, being required to work excessive hours, or being subjected to other unfair treatment, and who were not, by reason of this inequality of bargaining power, in a position to adequately protect themselves by way of contract.'[314] This is to say that, vulnerability should be the key factor, to serve the purpose of protecting those who cannot protect themselves due to an inequality in bargaining power. Going back to *Deliveroo*, the Riders certainly faced an inequality in bargaining power which allowed the platform to insert the impractical and seldom used substitution clause and negate worker status. The application of the personal service requirement, it is argued, frustrated the purpose of the statutory rights in this case.

It is also suggested that the threshold to satisfy the personal service requirement is too high. Bogg notes that it was clearly never the intention of either party in *Deliveroo* that the rider would never perform any work personally and they have thus taken on the obligation to perform at least some work personally.[315] He states that, post-*Uber*, the test could be applied with regards to 'whether, viewed realistically, this was a relationship in which the individual riders were free *never* to do any work personally and could have provided services *exclusively* via a substitute.'[316] However, even with this approach, it could be argued that a substitution clause gives permission for a platform worker to pass work to a substitute for every gig.

[312] Michèle Finck, 'Digital co-regulation: designing a supranational legal framework for the platform economy' (2018) 43(1) E.L. Rev. 47.
[313] Zoe Adams, 'One step forwards for employment status, still some way to go: The Supreme Court's decision in Uber v Aslam under scrutiny' (2021) 80 The Cambridge Law Journal 221.
[314] Ibid.
[315] Bogg (n284) 225.
[316] Bogg and Ford (n270).

Bogg suggests that a 'radical strategy would be to excise "personally" from the statutory definition.'[317] This would seemingly solve the issues caused by substitution clauses as it would no longer matter who fulfilled each gig. This shows that the issues created by personal service originate with the current wording of the statute. It is, thus, argued that since it is the wording of the statute which currently allows platforms to "contract out" of offering basic labour rights, it is this which much change in order to bring clarity to the protected status of platform work. The flexible nature of platform work means substitution clauses play little role other than as a vessel for platforms to escape rights obligations. Therefore, the personal service requirement should be removed by introducing a new, platform-specific statute.

It is argued that by trying to apply the same tests to an ever-diversifying labour market, we are trying to fit square pegs in increasingly round holes.[318] As Ruth Dukes argues, given that the courts are applying the long-standing tests for protected status to all work, we need platform-specific regulatory intervention if we want to effectively protect platform workers[319] or work towards clarifying their protected status. The result is, then, that personal service, as applied today, cannot be part of the test for protected status if we wish to clarify the position of platform workers. Given the flexible nature of platform work, the personal service requirement serves no purpose other than to give platforms the opportunity to confuse protected status – by denying that an individual has worker status through use of substitution clauses. Platform work contracts are particularly vulnerable to such exploitation given the typically low-skilled nature of the work. Only new legislation, to excise 'personally' from the worker definition, can rectify this and clarify the protected status of platform workers.

3.4 Mutuality of Obligation

To find worker status, the court also seek that mutuality of obligation exists between the hiring party and the individual seeking to prove worker status. It is argued that the concept of mutuality of obligation is a confused one which no longer plays a role in determining whether an individual has worker status.

[317] Bogg (n284).
[318] Michael Doherty and Valentina Franca, 'Solving the 'Gig-saw'? Collective Rights and Platform Work' (2019) 49(3) ILJ 352.
[319] Dukes (n302).

The role of mutuality has been subject to much debate, particularly in relation to its use in the test for employee status.

In *O'Kelly v Trusthouse Force plc*, the Court of Appeal held that a group of casual waiters were not employees due to a lack of mutuality of obligations.[320] This was because, contractually, there was neither an ongoing obligation for the restaurant to provide work, nor any such obligation on the waiters to accept it. What's more, the waiters were not obliged to finish each shift. Thus, O'Kelly mutuality requires an ongoing exchange of obligations to provide or accept work.

McGaughey[321] notes that a subsequent line of case law held up this interpretation of mutuality.[322] One principle which emerged required mutuality to be present for the duration of each "gig". Mutuality was also required between each work period to establish employee status. McGaughey criticises this stating that mutuality in this sense should 'be no part of the law'[323]. This is because it makes it too easy for potential employers to devise contracts which evade giving employment rights – for example by inserting clauses which state that it is possible to not complete a shift or that there is no ongoing obligation to provide / accept work.[324] This means employees would be unfairly denied rights as when 'contractual consent is required for a right, the very right is lost.'[325]

A different interpretation of mutuality arose from a separate line of case law – in which only an exchange of work and wage was necessary.[326] This consideration-based interpretation of mutuality does not require the same continued mutual obligation to provide, accept, or fulfil each "gig" as was the case in *O'Kelly*. The Supreme Court in *Autoclenz* also defined mutuality in a similar way, as being consideration. This is the view of mutuality preferred by McGaughey,

[320] *O'Kelly v Trusthouse Forte plc* [1983] ICR 728
[321] Ewan McGaughey, 'Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status' (2019) 48(2) ILJ 180.
[322] For example, *James v Greenwich LBC* [2008] EWCA Civ 35; *Carmichael v National Power plc* [1999] UKHL 47
[323] McGaughey (n321)
[324] Ibid.
[325] Ibid.
[326] For example, *McMeechan v Secretary of State for Employment* [1996] EWCA Civ 1166.

as well as many others – such as Professor Hugh Collins.[327] The Supreme Court also indicated that the relative bargaining power of the parties should be considered when determining protected status – described by McGaughey as a 'consistent, principled position'.[328] This approach seemingly removes the earlier risk that hiring parties using sham contracts to side-step offering labour rights.[329]

There have, thus, been two different judicial interpretations of mutuality. If we turn, now, to platform work – mutuality is still required to establish worker status. It is argued that *O'Kelly* mutuality would never be the threshold needed for worker status – since worker rights do not require continuity between gigs, there would never seem to be any need for mutuality to be present between each gig. Subsequent case law seems to confirm that only mutuality in the consideration sense is required to find worker status.[330] Freedland and Prassl do warn that, should mutuality remain necessary to find worker status, the court could 'revert to a more rigorous deployment of the requirement'.[331] This seems unlikely, as it is difficult to imagine what rationale the court could have for seeking anything more than an exchange of work and pay to justify worker rights. Nevertheless, whilst mutuality is necessary to find worker status, the risk remains.

Prassl has argued that, in the consideration sense, mutuality does play an important part to determine protected status because 'the statutory language requires a contract in all circumstances.' This seems to be rather indisputable as a fact given the statute explicitly references 'any other contract'.[332] What Prassl does not say, however, is that this means the presence of a contract should be used to determine whether an individual is an employee, worker or self-employed. Instead, he seems to imply that it is a necessary pre-requisite for anyone seeking labour law protection.

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[327] Hugh Collins, Keith Ewing and Aileen McColgan, *Labour Law: Text and Materials*, 2nd edn (Oxford: Hart, 2005) 165. See also, Bob Hepple, 'Restructuring Employment Rights' (1986) 15(1) ILJ 69, 71; Sandra Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26 ILJ 337, 347.
[328] McGaughey (n321).
[329] Ibid.
[330] See *Uber BV v Aslam* (2021) UKSC 5 [126] 'the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work' (Lord Leggatt).
[331] Mark Freedland and Jeremias Prassl, 'Employees, Workers, and the 'Sharing Economy': Changing Practices and Changing Concepts in the United Kingdom (March 14, 2017) Oxford Legal Studies Research Paper No. 19/2017 <http://dx.doi.org/10.2139/ssrn.2932757> accessed September 2020.
[332] ERA 1996, S230(3)(b).

Collin's makes the case that mutuality should not feature in any definition for worker, since it is nothing more than an indication that a contract exists.[333] To this extent, mutuality is something which can be present in a contract between a hiring party and all of either an employee, worker, or independent contractor. Since it does not aid in distinguishing these categories, it should not feature in the test to determine in which category an individual falls. Although this is an argument advanced with regards to worker status generally, it remains true in the case of platform workers.

Despite believing that mutuality is important to determine that a contract exists, Prassl does criticise the 'extension of mutuality beyond employee status'.[334] One reason for this, taking a similar view to Collins, is that doing so makes the 'fallacious assumption that the three statutory categories … are fundamentally the same.'[335] Furthermore, he believes that mutuality is being 'introduced as a proxy for subordination.'[336] This is problematic as it works on the assumption that intermittent work equates to increased independence and less need for labour rights. In reality, an absence of guaranteed future work actually leads to increased subordination for fear of losing subsequent shifts.[337]

Prassl and Collins argue that mutuality should not be applied to worker status. Although it is beyond the scope of this piece to discuss the test for worker status outside of platform work - it is agreed that this is the case and that mutuality (in the sense that a contract exists for the exchange of work and pay) should be no more than a pre-requisite for accessing rights. The above rationale for rejecting the mutuality test appears to hold up in the context of platform work too when thinking about determining whether a platform worker has legal worker status. Mutuality would not distinguish a platform worker who merits labour law protection from any other alleged worker with a contract to perform work for pay, but who is in business for themselves. However, there appears to be a gap in the current literature relating to the

[333] Collins (n267).
[334] Jeremias Prassl, 'Who is a worker?' (2017) LQR 133(July) 366, 370.
[335] Ibid.
[336] Ibid.
[337] Ibid, 371.

issue with the mutuality test when applied specifically to platform workers, which further emphasises why it should not be applied as a test to determine their protected status.

Bogg notes that control (encapsulating subordination, dependence and vulnerability to exploitation[338]) has been used to determine whether a contract exists between the hiring party and the purported worker. This was the case in *Uber* where the many different controls Uber exercised over its drivers were used by the Supreme Court to show that there was a contract between the platform and the drivers[339] – in other words, that there existed mutuality in its most basic form. By using control to decide whether a contract existed, the Supreme Court seemingly absorbed the concept of mutuality into the control requirement – where the existence of a contract is determined by the level of control held by the hiring party.

However, it is argued that the approach used in *Uber* highlights an issue with mutuality applied specifically to platform work. We have seen from the protestations to the requirement of mutuality in the test for worker status generally (that is, not specifically relating to platform work), that it exists in two forms. First, there is mutuality in the consideration sense (an exchange of work/pay). Second, the stricter requirement that each party is obliged to provide and accept a minimum amount of work.[340] The interpretation of mutuality from *O'Kelly* would not stand up today as being transferrable to the test for worker status. Platform work, for example, is centred on the completion of small, individual gigs with no continuing obligation to provide or accept work between those gigs. The court have now shown to find worker status, it seems that only an obligation to provide work for pay exists.

However, it is submitted that in relation to platform work – a vital qualification to this test for mutuality must be made. That is to say, there exists and obligation to undertake work in exchange for pay *between the platform and the platform worker.* Whilst this seems obvious, it is a crucial qualification. For, in relation to mutuality, platform work is distinguished from many other forms of work by the tripartite relationship which exists for the provision of

[338] Bogg and Ford (270).
[339] Ibid.
[340] As summarised in *Nursing and Midwifery Council v Somerville* UKEAT/0258/20/RN(V).

services. The platform brings platform workers onto the app, who then provide the service to end users, but were only able to do so because that end user had gone through the app to find them. At this point it becomes unclear between which two there exists an obligation to provide pay in exchange for work.[341] Such obligation could feasibly occur between the platform and the platform worker, or between the end user and the platform worker.[342] As Gaudio notes, 'employment laws is becoming increasingly incoherent or incomplete in dealing with multilateral organisational settings.'[343] Therefore, it is not sufficient to stop at a consideration-based view of whether mutuality exists – the Court must go a step further to pinpoint *where* it exists. This is very different to, for example, someone who casually take shifts working in an office. It is obvious that the necessary obligations here exist between the worker and the company hiring them. Uber tried to exploit this confusing tripartite relationship to evade offering statutory worker rights, by suggesting that they were nothing more than a matchmaker for those seeking and providing rides – and the contract to complete the ride was between the drivers and passenger. It was for this reason that, as Bogg highlights, the Supreme Court turned to control[344] to decipher where the obligations lie and imply a contract between Uber and the drivers to complete rides. Although other forms of work may exhibit a similar tripartite relationship, platform work is distinct in that this relationship is present in every platform work case.

It is argued that the law must be changed to prevent the possibility that platforms use the requirement of mutuality, along with the unique tripartite relationship that exists with platform work, to attempt to avoid offering worker rights, as this only creates uncertainty with regards to the protected status of platform workers. Mutuality, applied in the consideration sense, gives platforms the opportunity to declare, rightly or wrongly, that the obligations to exchange work and pay rest between the platform workers and end users. The fact that *Uber* went all the way to the Supreme Court shows that the complex web of contracts used by Uber meant that the question of whether the drivers were workers, was not a clear

[341] Giovanni Gaudio, 'Adapting Labour Law to Complex Organisational Settings of the Enterprise: Why Rethinking the Concept of the Employer is Not Enough' (2021) 50(2) I.L.J. 264.
[342] This was the basis of Uber's unsuccessful attempt to classify drivers as self-employed, see [2016] 10 WLUK 681; [2017] 11 WLUK 238; [2018] EWCA Civ 2748; [2021] UKSC 5.
[343] Gaudio (n341).
[344] Bogg and Ford (n270).

one. The court had to turn to control to find the source of the obligations. To this end, it seems logical that the method of control that the Supreme Court held to be 'of major importance' was Uber's control over pay[345] – indicating where lies the obligation to provide work for remuneration.

It is, however, unclear how any other platform work case would be decided should, for example, the platform impose fewer strict controls. Using control to do this then raises the same issues mentioned in the control section of this chapter – namely a lack of clarity as to exactly how much control must be present, or whether some controls are higher on the hierarchy than others. The use of an online platform to link platform workers and end users is a fundamental characteristic of platform work[346] which means that every platform work case may have to use the flawed control test to determine whether a contract exists between the platform and the worker. Therefore, new legislation is required to remove the need that a contract exist between the platform and the platform worker and prevent platforms from denying such a contract exists. It is argued that explicitly requiring the existence of a contract is unnecessary – for if an effective, platform-specific test to determine protected status existed, then satisfying the requirements set out in that test would serve the purpose of showing that a contract for the provision of services exists between the platform and platform worker.

The consensus amongst the current literary discourse is that mutuality is not a relevant factor to determine worker status as it does not distinguish a worker from an employee or independent contractor.[347] These submissions stand to reason, and it is argued that mutuality should play no part in the test to determine worker status. Although Prassl notes that the need for a contract is an important one[348] – it is argued that this requirement should be removed from the statutory requirements. Requiring the existence of any 'contract' will always leave room for a platform to exploit the tripartite relationship described above – similarly to how personal service is used to confuse protected status via substitution clauses. Instead, a new statutory test must be implemented which uses platform specific tests which,

[345] *Uber* (n275) [93].
[346] Cherry (n260).
[347] Collins (n267) ; Prassl (n304)
[348] Prassl (n304)

if satisfied, would serve to purpose of showing that a contract existed – but without the need to explicitly name it as a formal requirement. Such tests will be recommended in Chapter 4. Given that the judiciary must apply the statutory language to determine whether an individual is a worker, only new legislation would serve the purpose of removing the need for a 'contract' to find worker status.

3.5 Conclusion

This chapter has sought to make the case for legislative reform in order to clarify the protected status of platform workers. Whilst it is beyond the scope of this thesis to suggest that all platform workers should have legal worker status (for example, if they are genuinely self-employed) – it is argued that all should have clarity with regards to their protected status.

To determine whether an individual has worker status, the role of the judiciary is to apply the statutory language.[349] They ask whether there exists a contract to perform work personally which is not an independent business undertaking – by determining whether the three factors of control, personal service and mutuality are present.

This chapter has illustrated that there exist deep floors with each of these tests when applied in the context of platform work. The consequence of this is that platform workers cannot be certain of their protected status because the tests being applied are not suited to platform work and offer platforms the opportunity to attempt to contract out of rights provision. [350]

Given that platforms often attempt to enforce strict controls over platforms workers whilst trying to maintain that they are self-employed[351], control remains a relevant factor which should be used to determine whether a platform worker has worker status.[352] However, the current test for control is unclear with regards to the threshold which must be met to satisfy the requirement – and whether a hierarchy of factors indicating control exists. The judiciary

[349] *Clyde & Co LLP and another v Bates van Winkelhof* [2014] UKSC 32**,** [39]: 'there is no magic test other than the words of the statute themselves.' (Lady Hale)
[350] Bogg (n284) 221.
[351] *Uber* (n275)
[352] Bogg and Ford (n270).

have not addressed this issue and, in *Uber*, have arguably confused things more by labelling control over remuneration as holding more importance than other indicators.[353] Therefore, legislation would bring a clarity with regards to how this test is applied and allow platforms/platform workers to be clear as to their obligations.

It is argued that legislation is required to move the personal service requirement from the test to determine the protected status of platform workers. Given the nature of platform work being centred on the completion of small, low-skilled tasks[354] – the requirement of personal service gives platforms the opportunity to insert substitution clauses in the contract with the platform worker which are practically possible to make use of, but in reality, are inconvenient and seldom used. Therefore, it is possible for a platform worker to appear to exhibit the characteristics associated with worker status (e.g. being subject to control) but are unclear of their rights as the platform has inserted a substitution clause into the contract. Given that personal service is explicitly mentioned in the statutory wording, the judiciary have no choice but to enforce it as a test for worker status. New legislation covering platform workers would remove the personal service requirement and help clarify their protected status.

Finally, the requirement that a contract exists does not need to be in the test to determine the protected status of platform workers. The tripartite platform – platform worker – end user relationship creates a grey area in which it may become unclear between which parties the contract has been formed.[355] Such an issue could allow platforms to attempt to evade rights obligations, as was the case in *Uber*. As a result, control (which we have already found to be a flawed test) is used to determine whether a contract exists between the platform and the platform worker.[356] Therefore, it is suggested that legislation must be enacted to remove the requirement that 'any other contract' exists, in favour of platform-specific tests to determine protected status. If new tests successfully analyse the nature of the relationship, it is argued that the question of 'is there a contract?' would become moot, as satisfying the

[353] *Uber* (n275) [93]
[354] Cherry (n260)
[355] Gaudio (n341).
[356] Bogg and Ford (n14).

tests would show that there was, at least, an implied contract to perform work between the platform and platform worker.

All these issues with the current tests to determine protected status stem from the statutory definition of 'worker'.[357] Thus, as the judiciary have no option but to apply the words of the statute, these issues are unavoidable unless new legislation is introduced. Although the issues with control are a combination of judicial interpretation and a lack of statutory instruction, the personal service and mutuality requirements should have no place in the test to determine whether a platform worker is legally classified as a worker with access to basic statutory labour rights. Unless new legislation is enacted to establish the scope of labour rights for platform workers, these irrelevant tests will continue to cause confusion, as unclear and deficient tests are exploited by platforms seeking to dodge obligations to provide statutory labour rights. This creates uncertain situations in which platform workers may appear to have worker status in some form (for example, if they are under significant control), but not in others (if there is a valid substitution clause in the contract, or the platform devises a contractual web in which no written contract exists between themselves and the platform worker). Platform workers are stuck in no-mans-land between the worker, and independent contractor trenches. No matter which of these trenches they belong in, new legislation is their only clear and certain path there. Chapter 4 will look at proposals for such a legislative test.

CHAPTER 4: DETERMINING THE FORM OF PLATFORM SPECIFIC LEGISLATION

4.1 Introduction

The first three Chapters have sought to illustrate two things: first, that platform workers are in a legal no-mans-land between worker and independent contractor statuses. And, second, that legislation is the only means through which their protected status can be clarified. This

[357] ERA 1996, s230

has been done by showing that the Supreme Court in *Uber*, despite increasing the scope of statutory protection, did not clarify status or remove the need for legislation. Furthermore, it has been argued that the judiciary can never clarify protected status due to the extreme deficiencies of the tests to determine protected status, stemming from the statutory definition of worker. Therefore, the statue must be replaced in favour of one which is new and takes a platform-specific view to determining protected status.

The question, then, turns to what form this legislation should take. In order to suggest such a form, this chapter will analyse two recent legislative approaches to defining the protected status of platform workers. These are California's AB5 Bill[358], and the European Union's proposed Directive on improving working conditions in platform work[359].

It seems necessary to make clear that the assessment here is not one of whether these tests would effectively protect more platform workers. Although preventing misclassification of some platform workers as independent contractors may be a result of the recommended statutory route, the true lens through which the tests in this chapter will be analysed is with regards to clarity of protected status.

In order to determine whether the proposed tests would bring clarity to the protected status of platform workers, we must build upon the analysis of the previous chapters. In doing so, we can determine whether implementing an AB5 or EU Directive- style legislation would combat the issues posed by the existing tests for worker status derived from statute. It will become evident that, between the suggested proposals, control, personal service and mutuality will no longer be applied in a way which causes uncertainty with regards to protected status.

Before addressing, in turn, the ways in which these proposals improve upon the current tests, it is important to provide some background as to the two proposals.

[358] Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020).
[359] European Commission Directive Proposal 2021/0414 (COD) on improving working conditions in platform work (2021).

4.2 The Contents of AB5

The AB5 Bill starts by stating that 'a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied.'[360] Simply, this is a presumption that anyone who provides services for pay is an employee. This assumption may be rebutted, however, upon satisfying the three stage ABC test which follows. Should this test be satisfied, an individual is considered as having independent contractor status, according to AB5.

The Bill then goes onto set out the three-part ABC test which must be satisfied to show that an individual is an independent contractor. It states that a person is an independent contractor when:

"(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."[361]

All three criteria must be met to rebut the presumption that an individual is an employee. [362]

4.3 The Origins of AB5

[360] Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020).
[361] Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020).
[362] Ibid.

Although no longer applying to platform workers in California (see s4.3.1 below), Assembly Bill Number 5 is an interesting proposal to analyse given the short-term impact it had on the protected status of platform workers, and the reception it received.

The test that has been codified in the AB5 Bill is not a new one. Instead, the principles were established by the California Supreme Court in *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County.*[363] This was a landmark decision, finding Dynamex drivers to be legally employees for the purpose of the Californian Industrial Welfare Commission Wage Orders.[364]

Dynamex is a courier service which offers same day delivery services and had previously classified their drivers as employees, before money saving measures were introduced in 2004. This saw the drivers redefined as independent contractors.[365] Three months after having left his job with Dynamex, Charles Lee, the claimant, brought legal action against the courier firm on the grounds that the misclassification of the drivers as independent contractors was in violation of the IWC Wage Order Number 9.[366] In determining the protected status of the drivers, the Court endorsed the use of the "ABC test" to determine whether someone is found to be an independent contractor.[367] The ABC test mirrors that above, which was codified in the Assembly Bill Number 5.

The Dynamex decision was handed down in April 2018 and due to the expansive nature of the ABC test, the 'practical effect' of the decision was 'to make many more workers employees'[368] for the purpose of accessing the rights available in the Wage Orders. Consequently, calls came

[363] *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, 416 P.3d 1 (2018).
[364] These set the requirements which must be met by employers, covering a range of topics: minimum wage and overtime rates; meal period and rest break requirements; alternative workweek schedules; employee recordkeeping; reporting time pay; uniforms and equipment; change rooms and resting facilities; penalties for violations. See < https://ca.practicallaw.thomsonreuters.com/w-020-1911?transitionType=Default&contextData=(sc.Default)&firstPage=true >.
[365] Timothy Kim, 'The Dynamex Decision: The California Supreme Court Restricts Use of Independent Contractors' (Sheppard Mullin, May 2018) <https://www.laboremploymentlawblog.com/2018/05/articles/class-actions/dynamex-decision-independent-contractors/ > .
[366] IWC Wage Order No9 < https://www.dir.ca.gov/IWC/IWCArticle09.pdf > This covers the range of topics above (n6) , relating specifically to 'transportation services'.
[367] *Dynamex* (n363)
[368] Miriam Cherry, 'Dispatch – United States: "Proposition 22: A Vote on Gig Worker Status in California"' Comparative Labor Law & Policy Journal, forthcoming.

from both large companies who utilise gig economy workers, including platform workers, as well as the workers themselves, for legislative intervention. Whilst the companies called for legislation to overturn the application of the ABC test in *Dynamex*, many workers and unions argued that the test should be codified to guarantee their protected employee status.[369] California Assemblywoman Lorena Gonzalez sponsored a Bill in 2019, which became Assembly Bill Number 5 and was enacted in September of the same year. The Bill expanded the scope of rights available to all California employment laws. This includes those in the California Labour Code. [370]

4.3.1 The Reaction to AB5 – Praise, Opposition and Proposition 22

By codifying the ABC test from *Dynamex*, the AB5 Bill had the practical effect of re-classifying many gig economy workers in California as employees, thus affording them access to a new range of labour law rights. For those who work as part of the gig economy, the reaction was generally a positive one. The implementation of the AB5 Bill and the ABC test was praised as a mechanism which 'streamlines the process of establishing employment status' as well as aiding those who are 'suffering disproportionally from the impact of the coronavirus pandemic due to rampant and systemic misclassification.'[371] The Bill has been hailed as a 'progressive' and 'forward thinking change'[372] given that it has sought to finally end the misclassification of gig economy workers as independent contractors.

However, many large organisations, including platforms such as Uber and Lyft, came out in opposition of the Bill. Notably, these two platforms refused to comply with AB5[373], with Uber and Postmates (a US based food and grocery delivery platform[374]) challenging the constitutional validity of the Bill in court.[375] Lyft also threatened to leave California as a result

[369] Ibid.
[370] See < https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=LAB > This governs wage orders, meal and rest breaks, vehicle reimbursements and worker's compensation.
[371] Press Release, Teamsters Port Division Director Comments on AB5 (March 21, 2020), https://teamster.org/2020/03/teamsters-port-division-director-comments-ab5/ accessed February 2021.
[372] Cherry (n368).
[373] Ibid.
[374] See <https://postmates.com/about >
[375] Olson v. California, No. 19-CV-10956, 2020 WL 905572 (C.D. Cal. Feb. 10, 2020).

of the AB5 Bill.[376] As a result of the strong opposition from the likes of Uber and Lyft, a ballot initiative, known as Proposition 22, was scheduled for the November 2020 US elections.[377] Proposition 22 called for app-based transport and delivery companies to be exempt from the impact of AB5, in other words, allowing them to identify their workers as independent contractors instead of treating them as employees. The campaign was funded mainly by Uber, Lyft and DoorDash[378], meaning the "vote yes" campaign for Proposition 22 had unmatchable financial power, spending over $205 million.[379] Ultimately, Proposition 22 was passed with around 58% of the vote in California.[380] This appeared to be a consequence of the mass imbalance in campaigning power, along with scaremongering amongst those who relied on the likes of Uber and Lyft to get around and were concerned about the platforms leaving California if Proposition 22 did not pass.[381] Fears were also raised with regards to the working environment for those platform workers re-classified as employees under AB5. Many believed that platforms would restructure how the operate and that they would become 9 to 5 employees as a result. Whilst there is no guarantee that this would have happened, the platforms would have been within their rights to do so.[382] The "vote yes" campaign even used the stories of real drivers who did not want to become 9 to 5 employees as a method of promoting and furthering their cause.

The success of Proposition 22 was met with contempt from those who had been in favour of classifying platform workers as employees. Cherry described it as a 'retrenchment during a period of time when gig workers were finally starting to be recognized as meriting parity with other workers.'[383]

Cherry argues that the impact of Proposition 22 has been the creation of a new intermediary category of worker in California. Although now classified as independent contractors,

[376] Kate Conger, '*Uber and Lyft Get Reprieve After Threatening to Shut Down*' (N.Y. TIMES, Aug 2020) <https://nyti.ms/2QarROv. > accessed February 2021.
[377] Cherry (n368).
[378] See < https://www.doordash.com >.
[379] Samantha Prince, 'The AB5 Experiment – Should States Adopt California's Worker Classification Law?' (2021) American University Business Law Review forthcoming.
[380] Ibid.
[381] Cherry (n368).
[382] Prince (n379).
[383] Cherry (n368).

Proposition 22 does still afford some basic rights to platform workers. These include a healthcare subsidy, minimum earnings guarantee whilst working, occupational accident insurance, and protection from employment discrimination.[384] This is more than would be available to an independent contractor and less than the full range of rights given to employees. Thus, the success of Proposition 22 has seemingly created a new kind of worker in California, much alike the legal worker status established in the UK.

Whilst Proposition 22 means that the ABC test from the AB5 Bill is no longer applicable to platform workers in California, we have seen that whilst it was in force, it did successfully serve the purpose of correcting the misclassification of platform workers as being independent contractors.

4.4 The EU's Proposed Directive

In December 2021, the European Union proposed a new Directive 'on improving the working conditions in platform work.'[385] In determining the protected status of platform workers, the proposal marks a significant shift in policy from the EU since the European Commission in 2016 accepted that platforms were providing a new, flexible job market and encouraged member states not to legislate on the issue.[386] The proposed test approaches protected status as follows.

First, Article 2 of the proposal defines a platform, platform work and who is a platform worker:

'(1) 'digital labour platform' means any natural or legal person providing a commercial service which meets all of the following requirements:

(a) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application;

(b) it is provided at the request of a recipient of the service;

[384] Ibid.
[385] European Commission Directive Proposal 2021/0414 (COD) (n359).
[386] Ludovic Voet, 'In the EU, platform workers scored a victory' (IPS Journal, March 2022) < https://www.ips-journal.eu/work-and-digitalisation/platform-workers-in-the-eu-scored-a-victory-5811/ >.

(c) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location;

(2) 'platform work' means any work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service;

(3) 'person performing platform work' means any individual performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved;

(4) 'platform worker' means any person performing platform work who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice.'[387]

The proposal then sets out a legal presumption that platform workers are[388]:

1. The contractual relationship between a digital labour platform that controls, within the meaning of paragraph 2, the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship. To that effect, Member States shall establish a framework of measures, in accordance with their national legal and judicial systems.

The legal presumption shall apply in all relevant administrative and legal proceedings. Competent authorities verifying compliance with or enforcing relevant legislation shall be able to rely on that presumption.

2. Controlling the performance of work within the meaning of paragraph 1 shall be understood as fulfilling at least two of the following:

(a) effectively determining, or setting upper limits for the level of remuneration;

(b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;

[387] European Commission Directive Proposal 2021/0414 (COD) (n359) Article 2.
[388] Ibid, Article 4.

(c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;

(d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;

(e) effectively restricting the possibility to build a client base or to perform work for any third party.

Article 5 offers the possibility that the presumption can be rebutted – but leaves the method of doing so down to EU Member States. [389]

Given the timeliness of the proposal, and the radical approach to determining protected status set out within, the proposed Directive should form part of our analysis to find a legislative form which specifically clarifies the protected status of platform workers. As we look at this proposal along with AB5, we can begin to map out a form of legislation which is capable of clarifying protected status.

4.5 The Intended Scope

Before considering the strength of AB5 and the EU's proposed Directive as inspiration to create platform-specific legislation which clarifies protected status, two important issues in terms of the scope of such an intervention arise.

First, to have the desired effect, the route proposed below would have to be applied across all current legislation conferring rights those satisfying the worker definition. For example, it would not clarify the protected status of platform workers if a proposed legislative route were applicable only to the National Minimum Wage Act[390], and not the Working Time Regulations.[391] Such an approach would result in different protected statuses across varying

[389] Ibid, Article 5.
[390] NMWA 1998.
[391] Working Time Regulations 1998, SI 1998/1833 (WTR 1998).

statutory rights, and so a platform worker could not be clear as to their protected status and the rights available to them.

Second, a judgment must be made as to the category of protected status that, if legislation was enacted, we would be seeking to afford platform workers. This is a significant decision as the distinction between worker and employee status is a wider scope of available labour rights. However, the scope on this thesis relates to clarity of protected status. Whether platform workers should be classified as workers or employees is, itself, the subject of another full thesis – case law related to worker status, though they are some who believe platform workers should have employee status.[392] In our analysis of clarity, the distinction between employee and worker is of reduced importance – as our aim is to use the tests to clarify protected status, whatever that may be. For the purposive of fitting with the narrative of current case law in UK, in which platform workers seek to be categorised as workers,[393] we will continue on the basis that the proposed legislation will seek to distinguish between worker, and independent contractor status. AB5 and the proposed Directive, in their wording, seek to find employee status. However, the US and many EU Member States have not introduced the middle ground worker status as we have in the UK, to expand the scope of labour law protection to those who do not satisfy the employee definition, but who are not genuinely self-employed.[394] Therefore, as we will seek to find a statue that distinguishes workers from the self-employed we will, from here on, read and refer to these tests as though they are seeking to establish worker status, not employee status.

4.6 Fixing the Framework – Determining the Form of Legislation

We will now look to find the most effective form new legislation could take. In order to show this, we will seek to determine whether any combination of AB5 and the EU's proposed Directive can combat the issues raised in previous Chapters, which have shown the current tests stemming from the statutory definition of worker, to prevent platform workers having clarity as to protected status. Namely, we shall address the issues arising from the

[392] Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach' (2017) 6(1-2) *Spanish Labour Law and Employment Relations Journal* 6.
[393] For example, *Uber BV v Aslam* (2021) UKSC 5.
[394] Simon Deakin and Gillian S Morris, *Labour Law* (6th edn, Hart Publishing 2012) 175.

requirements of mutuality, control and personal service. We shall also consider the steps taken by AB5 and the proposed Directive to address the fact that currently, litigation is required for many platform workers to access statutory rights – a key indicator that legislation is necessary according to Dukes.[395]

4.6.1 Litigating to Access Basic Rights

The basis of Ruth Dukes' case for legislative intervention to clarify protected status is that an individual should not have to litigate in order to access benefit from their labour rights.[396] However, even if the Courts no longer give regard to the written contract, it is still this that dictates an individual's protected status at the moment it is signed.[397] If that individual believes that the platform has misclassified them, they must then fight them on that basis and (potentially) go to court in order to benefit from basic labour rights. This, in turn, puts them at a disadvantage as many will lack the resources to fight wealthy platforms in court. It is for this reason that Dukes suggests that reversing the burden on proof, with a presumption that platform workers are workers in the legal sense, would be a step towards clarifying protected status, removing the need to litigate to access basic rights.[398]

AB5 inspired legislation would achieve this aim, as it begins with a presumption of worker status and therefore reverses the burden of proof – placing it on the platform to show that platform workers are independent contractors. This removes what is currently an unfair burden on platform workers, who must prove they have protected status.[399] The is no doubt that reversing the burden of proof takes steps to clarify the protected status of platform workers. However, there is an issue with the way in which AB5 goes about establishing this presumption.

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[395] Ruth Dukes and Wolfgang Streek, 'Putting the Breaks on the Spread of Indecent Work (Social Europe, March 2021) < https://socialeurope.eu/putting-the-brakes-on-the-spread-of-indecent-work > accessed October 2021.
[396] Dukes (n395).
[397] Ruth Dukes, 'Regulating Gigs' (2020) 83(1) MLR 217, 221.
[398] Dukes (n390).
[399] Sandra Fredman and Darcy Du Toit, 'One Small Step Towards Decent Work: *Uber v Aslam* in the Court of Appeal' [2019] 48(2) ILJ 260, 266.

4.6.2 Mutuality in AB5

This issue concerns the confusion caused by the requirement that mutuality of obligations exist – even where this is meant to simply mean a contract exits between the platform and platform worker. It was argued that due to the confusing nature of the test requiring mutuality of obligations, the statutory requirement that a contract be present should be removed from the test to determine the protected status of platform worker. This point is emphasised by the potential that the tripartite platform – platform worker – end user relationship could be exploited by platforms to deny the presence of a contract[400] between themselves and the purported workers, as was the case in *Uber*.[401] Instead, a contract could be implied between the platform and platform workers through the presence of other factors, such as control. An AB5 style legislation would not resolve the lack of clarity with regards to mutuality, as it still requires that work is done for pay as a pre-requisite to the presumption of worker status. This means that platforms could attempt to make the same case as Uber, that no contract for such existed between themselves and the platform workers, as a means of evading labour rights obligations. It is argued that any legislation which drew inspiration from AB5 would have to amend this requirement, in order to bring clarity to the protected status of platform workers. This does not discount, however, the importance that reversing the burden of proof plays to clarify protected status.[402] At this point, we can look to the EU's proposed Directive, to judge if this can help improve upon AB5's presumption of worker status.

4.6.3 The EU Directive's (Qualified) Presumption

The clarity of the presumption of worker status in the Directive is, as in AB5, limited by the inclusion of another factor. The same must be said of the presumption in the EU's proposed Directive. To be presumed to have worker status according to the Directive, two forms of

[400] Giovanni Gaudio, 'Adapting Labour Law to Complex Organisational Settings of the Enterprise: Why Rethinking the Concept of the Employer is Not Enough' (2021) 50(2) I.L.J. 264.
[401] *Uber* (n394).
[402] Fredman and Du Toit (n399).

control listed must be found. This seems to narrow the scope of the presumption[403], and platform could seemingly argue that the starting point when applying the Directive is not a presumption that platform workers have worker status, but is the analysis of control. Then, given that the Directive requires two forms of control to be present, a platform could then make use of the inequality of bargaining power to twist the reality[404] into one where only one of these controls is present – thus evading statutory rights obligations. Therefore, to clarify protected status, control (or lack thereof) should not be part of the presumption, but instead form the criteria for rebuttal of worker status.

The proposed Directive does provide specific regulation of platform work as it takes steps to define platform work and apply the tests directly to it. If we remove control from the Directive's presumption of worker status, then the presumption becomes much clearer for platform workers.[405] The definition of a 'digital labour platform' appears to be accurate – as all platforms operate electronically, involve an end user making a request, and set up the work to be done by the platform worker. Prassl notes that the EU's definition of platform works means platform workers such as Uber drivers and Deliveroo riders would certainly be covered by the statute.[406] Therefore, it appears that a definition of platform work / platform workers copying the wording of the EU, would help bring clarity to protected status of platform workers.

Therefore, to clarify the protected status of platform workers – the presumption of worker status, inspired by both AB5 and the EU's proposed Directive, should be used to reverse the burden on proof onto platforms – who must prove that platform workers are in fact independent contractors, should they wish to avoid labour law rights obligations. However, the AB5 requirement that work is done for pay, and the EU's need for control to benefit from the presumption should not feature as they narrow the scope of the presumption[407] (instead

[403] Ruwan Subasinghe (*Twitter*, 9 December 2021) < https://twitter.com/RuwanSubasinghe/status/1468887828369182721 > accessed 20 January 2022.
[404] Zoe Adams, 'One step Forward for Employment Status, Still Some way to Go: The Supreme Court's Decision in *Uber v* Aslam Under Scrutiny' (2021) 80(2) Cambridge Law Journal 221.
[405] Subasinghe (n403).
[406] Jeremias Prassl (*Twitter*, 9 December 2021) < https://twitter.com/JeremiasPrassl/status/1468886317790552064 > accessed 20 January 2021.
[407] Subasinghe (n403).

favouring control as a factor relevant to rebutting the presumption). The test should use definition provided by the EU's proposed Directive, to bring all platform workers under the presumption of worker status.

4.6.4 Control

Previous Chapters have found the control test to be one which is extremely relevant to platform workers, given the controls platforms often exercise over them, and it should, therefore, play a significant role in determining their protected status. However, the current application is deeply flawed from the perspective of clarity. This is due to a lack of both a clear threshold required to satisfy the requirement, and a definite list of criteria that the Court would consider to determine protected status (see Chapters 2 and 3). Furthermore, the Supreme Court in *Uber* seemed to introduce the possibility that a hierarchy of control exists,[408] with the top of that hierarchy changing on a case-by-case basis, depending on what the Court deems to be the purpose of the statute offering the right in question.

To determine whether an AB5-style statute would clarify the protected status of platform workers, we must ask whether applying the AB5 tests would solve issues such as those concerning the application of the test for control.

It is argued that an AB5 style Act would provide instruction for the application of the test for control currently missing in existing labour law legislation and would, thus, help clarify the protected status of platform work. This is because the first strand of the ABC test offers a quantifiable control threshold to control. Part A of the test states that, to displace the presumption of worker status, the individual must be 'free' of control – that is to say, that exactly zero control is exercised by the platform over the platform worker. As Sprague notes, 'this means that they (the platforms) will not be able to monitor the quality of the work performed, nor control any aspect of how, when, or where their workers will perform services for customers'[409] if they wish to successfully classify their platform workers as independent

[408] *Uber* (n394) [94].
[409] Robert Sprague, 'Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?' (2020) 11 Wm & Mary Bus L Rev 733, 765.

contractors. This removes the need for the judiciary to balance different factors against each other in order to draw their conclusions[410] - which serves to clarify protected status, as a platform worker could now look at the reality[411] of their relationship with the platform, and comfortable determine whether they meet this threshold. This also removes any confusion which may be caused by the Supreme Court's hierarchy of control, as any control is sufficient to find worker status, meaning no one form of control is more important or indicative of worker status than another.

Legislation mimicking that of AB5 would not, however, provide a clear list of controls which would be considered by the judiciary when determining protected status. As a result, the list would remain an open-ended one, which would make it unclear to platforms and platforms workers the exact nature of their relationship. Taking the *Uber* litigation as an example, we see that some controls have been held to be more important than others. For example, the ET referred to the fact that Uber interview and recruit drivers[412] as one control indicative of worker status. However, this did not "make the cut" to be one of the five most important forms of control in the opinion of the Supreme Court.[413] Under an AB5 style test, if an individual was free from control barring the fact they were interview and recruited in a similar way to Uber drivers, it seems that litigation could likely follow. In this case, it is not certain whether such a low-level control falls within the scope of the legislation.

To counter this lack of clarity in AB5, we can draw inspiration from the EU Directive. The Directive does provide a clear list of factors to be determined in order to find control. A combination of the quantifiable threshold in AB5, along with a closed list of factors indicating control from the Directive, would therefore allow platform workers to essentially complete a checklist based on their working reality, allowing them to determine with certainty their protected status.

[410] Eric Markovitst, 'Easy as ABC: Why the ABC Test Should be Adopted as the Sole Test of Employee – Independent Contractor Status' (2021) 42 Cardozo Law Review 224.
[411] 'Both under the contract for the performance of the work and in fact' seems akin to the approach of the Supreme Court in *Autoclenz Ltd. v Belcher* [2011] UKSC 41.
[412] *Aslam v Uber BV* [2016] 10 WLUK 681 [92].
[413] *Uber* (n394) [93] – [100].

There is however, some issue with the wording of the factors chosen by the EU in the proposed Directive. Countouris believes that the controls set out in (a) and (d) are too restrictive and could reinforce the Yodel model.[414] In Yodel, delivery drivers were found to be self-employed[415], with the European Court of Justice taking for granted[416] the impact of certain elements of the contract as means of control over the drivers. For example, it 'did not explore the repercussions of turning down too many job assignments' or analyse other controls such as 'through customer-led ratings, financial incentives to work longer hours, geolocation systems, scheduling software and others.' [417] The decision focused too much 'on the formal description of the relationship … to the point of omitting an investigation into the most problematic elements of the case.'[418] Georgiou notes that the proposed Directive does not allow the use of star rating systems to succeed as indicators of control.[419] Given that these are often used by platforms to control and monitor the work done by platform workers, not considering these as controls indicating worker status too appear too restrictive.

The tests for control set out by the proposed Directive are criteria taken from case law in various EU Member States, such as France, Germany and Spain.[420] Therefore, it is argued that, when enacting legislation which applied to UK platform workers, UK case law could provide inspiration for the closed list of factors which will be considered to determine control. The Supreme Court in *Uber* gave five clear factors, all of which were pertinent to platform work and, unlike those in the Directive, take account of the more nuanced controls in place, such

[414] Nicola Countouris (*Twitter*, 9 December 2021) < https://twitter.com/N_Countouris/status/1468923060875104268 > accessed 20 January 2021.
[415] C-692/19, *B v Yodel Delivery Network Ltd* [2020]
[416] Catherine Barnard and Despoina Georgiou 'EU Developments in the Labour & Social Field: Jurisprudential and Regulatory Responses to the Digitalisation of Work' (Research Gate, October 2021) < https://www.researchgate.net/publication/355535946_EU_Developments_in_the_Labour_Social_Field_Jurisprudential_and_Regulatory_Responses_to_the_Digitalisation_of_Work > accessed 10 January 2022.
[417] Ibid.
[418] Antonio Aloisi, '"Time Is Running Out". The Yodel Order and Its Implications for Platform Work in the EU' (2020) 13(2) Italian Labour Law e-Journal 77.
[419] Despoina Georgiou, 'Some Thoughts on Potential Loopholes in the Personal Scope of the Commission's Proposed Directive on Platform Work' (Research Gate, December 2021) < https://www.researchgate.net/publication/356971811_Some_Thoughts_on_Potential_Loopholes_in_the_Personal_Scope_of_the_Commission%27s_Proposed_Directive_on_Platform_Work?enrichId=rgreq-8cdc1b237223796e9cf8e470c77301c1-XXX&enrichSource=Y292ZXJQYWdlOzM1Njk3MTgxMTtBUzoxMTM2NDgxMjI1NzExNjIzQDE2NDc5Njk2NDc3NDY%3D&el=1_x_3&_esc=publicationCoverPdf > accessed 10 January 2022.
[420] Valerio De Stefano and Antonio Aloisi, 'European Commission takes the lead in regulating platform work' (Social Europe, 9 December 2021) < https://socialeurope.eu/european-commission-takes-the-lead-in-regulating-platform-work > accessed 15 January 2022.

as the use of star ratings systems to control the performance of work. Although the decision did not bring clarity to protected status (see Chapter 2), that does not mean the controls considered were in any way wrong or inappropriate to platform work. Therefore, using only the five controls in *Uber*[421] to determine whether control is present, would present a much clearer test for control than that suggested by the EU. Although the decision did not bring clarity to protected status (see Chapter 2), that does not mean the controls considered were in any way wrong.

Given all of the above discussion as to the form that legislation which clarifies protected status should take, it is submitted that new legislation which draws inspiration from both AB5 and the proposed EU Directive, would be effective, if it took the following form.

This suggestion accounts for the presumption of worker status, for all platform workers, with a quantifiable and closed test for control. This would offer:

A) A presumption that all platform workers (as defined by the Directive) are workers for the purpose of receiving statutory labour rights.

B) The presumption can be rebutted if:

    a. The platform worker is free from the control of the platform;
    b. Control is understood to mean (the following taken from *Uber*[422]):
        i. The platform dictates how much the platform worker is paid for the work done.
        ii. The terms of the contract are set by the platform, with no room for negotiation.
        iii. The platform workers choice with regards to job acceptance / rejection is constrained by the platform – through the use of penalties (such as being logged off the app).

[421] *Uber* (n394) [93] – [100].
[422] *Uber* (n394).

iv. The platform restricts the way in which the services are delivered – including through monitoring of performance via customer ratings which invoke penalties.
v. The platform prevents the platform worker from establishing any relationship with the end-user capable of extending beyond each gig – for example by restricting communication between them.

It is argued that this provides us with a clear test which allows platform workers to be certain of their rights and obligations. They begin with a presumption of worker status, which can only be rebutted by a quantifiable amount of control, dictated by a closed list of relevant factors. Furthermore, should litigation ever arise under this legislative model, the Supreme Court's analysis in *Uber* would remain relevant and provide a useful judicial guide to applying the legislation.

4.6.5 Personal Service

Though we have now determined the most effective legislative means of clarifying protected status using AB5 and the proposed EU Directive as inspiration – there remains one issue with the current tests which has not been addressed – personal service. However, we see that the platform-specific test suggested, has the desired effect of removing the personal service requirement.

The personal service requirement has no place in determining the protected status of a platform worker, as it serves little purpose other than providing an opportunity for platforms to contract out of labour law obligations.[423] It is for this reason that Chapter 2 made the case that this requirement, originating from the statutory requirement that work is done 'personally', should be excised from any test to determine the protected status of platform workers. The above proposal achieves this aim, as there is no mention in the test of any personal service requirement – and therefore nothing to suggest that an unqualified substitution clause alone could negate worker status.

[423] Alan Bogg, 'Taken for a Ride: Workers in the Gig Economy' (2019) L.Q.R 135, 219-226.

4.7 The Remaining Requirements – Are They Necessary?

We have, thus far, failed to determine whether parts B and C of the ABC test found in the AB5 Bill would help clarify the protected status of platform workers. It is argued that a statute which serves that purpose can be achieved without these parts of the test.

First, part B states that, to find that a platform worker is self-employed, they must (along with satisfying the other two requirements) perform work which is outside the usual course of the hiring entity's business. This cannot form any clarified test for protected status, as it accentuates a problem which exists with the current tests. That is, it gives the opportunity for platforms to create a narrative in which they misrepresent the nature of their business to avoid rights obligations.[424] In *Uber*, the platform claimed to be no more than a matching service, instead of a private hire vehicle service.[425] Any test which can be manipulated in such a way is capable of creating a confusing landscape in which platforms deny they owe basic labour rights to platform workers. Therefore, it should not form part of the test for protected status.

Second, part C of the ABC test asks whether 'the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.' Although this appears to be valid question to determine whether an individual is really in business for themselves, it too should not form part of the test to determine the protected status of platform workers. The nature of the question is focussed on the individual platform worker. This means that, if applying this test, we could be left with the confusion scenario in which those working for the same platform, have different protected status. This possibility creates confusion and so, as we seek clarity, any test which could lead to such a scenario should be avoided.[426] However, a somewhat modified version

[424] Sprague (n409) 753.
[425] *Aslam* (n412).
[426] The test does appear to have merit in differentiating between workers and the genuinely self-employed. However, as the focus of this piece is clarity – this must be the guiding principle to determine the most effective legislative test.

of this test has already been suggested to form part of the legislation clarifying protected status. The purpose of part C of the ABC test seems to be to determine whether an individual is engaging in an independent business venture.[427] It is argued that a similar purpose is served by asking 'does the platform allow the platform workers to engage in an independently established trade?'

Phrased this way, taking a platform-focused approach, the answer would be the same for all those who work for the same platform. A similar question was posed by the Supreme Court in *Uber* who used Uber's restriction of driver's ability to establish independent trade as one of the five control indicators, indicative of worker status.[428] Therefore, as it has been suggested above the AB5 and EU style legislations be merged to give a list of controls considered to determine protected status, using the Supreme Court's judgment in *Uber* as inspiration for that list – part C of the ABC test has seemingly now been absorbed into a question of control. This approach brings much greater clarity than if part C of the ABC test was applied as found in AB5.

For completeness, we should acknowledge Article 5 of the EU's proposed Directive – which gives EU Member States the power to determine by what means the presumption of worker status could be rebutted. In the legislative test proposed here, a lack of control has been used to rebut the presumption, taking inspiration from the ABC test in AB5. Leaving the question of rebuttal to Member States undermines the clarity of the proposed Directive, as states could make it easy to rebut the presumption.[429]

4.8 A Codified Improvement on *Uber?*

Looking at the proposed test from a wider-view, it becomes clear that the suggested legislative test does not fall far from the Supreme Court's assessment in *Uber*, or the approach

[427] Veena Dubal, 'Economic security & the regulation of gig work in California: From AB5 to Proposition 22' (2022) 13(1) European Labour Law Journal 51 ; Keith Cunningham-Parmeter, 'Gig-Dependence: Finding the Real Independent Contractors of Platform Work' (2019) 39 N Ill U L Rev 379.

[428] *Uber* (n394) [100].
[429] Georgiou (n419).

to protected status proposed by Davidov,[430] Freedland and Kountouris[431]. Namely, control is being used as the main vessel to determine whether a platform worker has worked status or is an independent contractor. The Supreme Court used control as a proxy to determine subordination and dependency and justify the allocation of worker rights to Uber drivers. [432] This legislative proposal, however, marks a significant improvement on the Uber decision in terms of clarity. Not only does it reverse the burden of proof, but it quantifies control, closes the list of factors which can be considered to indicate control, removes the need for an inconsistent statutory purposive approach to be taken to find worker status, and removes the potential for any confusing hierarchy of control to be implemented. At no point has it been suggested that the *Uber* decision was wrong, it has been universally welcomed from a worker protective viewpoint.[433] What the proposed legislation has done, is brought much needed (and currently lacking) clarity to the test to determine the protected status of platform workers.

4.9 Conclusion

This Chapter has sought to offer novel approach to the clarification of the protected status of platform workers. It has recommended a statutory proposal to determining the protected status of platform workers which, if enacted, would mean platform workers would be certain of their protected status and, thus, be aware of their statutory labour rights. Two interesting proposals are California's AB5 Bill[434], the European Union's proposed Directive on improving conditions in platform work.[435] Despite AB5 no longer applying to drivers who operate via platforms, it has been illustrated that the Bill can still be a source of inspiration to clarify the protected status of platform workers. The same can be said of the EU's proposed Directive. When we look at these proposals together, the most effective of legislating to clarify the protected status of platform workers specifically, is through the following means.

[430] Guy Davidov, 'A Purposive Approach to Labour Law' (OUP 2016).
[431] Mark Freeland and Nicola Kountouris, 'The Legal Construction of Personal Work Relations' (OUP 2011).
[432] Alan Bogg and Michael Ford QC, 'The death of contract in determining employment status' (2021) LQR 392.
[433] See for example Dukes (n390) who favours legislation, but welcomes the outcome of *Uber*.
[434] Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020).
[435] European Commission Directive Proposal 2021/0414 (COD) (n359)

The test should begin with presumption that all platform workers are, legally-speaking, workers. This is taken from the shared value of the two proposals that such a presumption exists, reversing the burden of proof – putting the onus on platforms to instead prove that a platform worker does not have worker status.[436] For clarity, we have removed the work for pay requirement from the presumption in AB5, and the 'control' requirement in the Directive.[437]

The legislation proposed would then go to the means through which the presumption of worker status can be rebutted by the platforms. Here, we take the first strand of the ABC test, that platform workers must be free from control of the platform, in order to rebut the presumption. This is a significant improvement on the current test, as it legislatively quantifies the control threshold. In order to bring further clarity, we take the concept from the EU Directive proposal – and define what is meant by control – so to make it clear which factors are indicative of worker status. We suggest that the proposals in the Directive are somewhat flawed[438] and therefore, adopting the five controls highlighted by the Supreme Court in *Uber* would provide us with a clearer test, with less scope to be manipulated by platforms seeking to evade rights obligations. For the same reason, we adopt AB5's 'free form control' threshold, instead of the EU's 2/5 approach.[439]

Parts B and C of the ABC test in AB5 do not necessarily provide clarity and should not be included in any legislative test in their existing form. However, it is argued that the spirit of part C of the test in encapsulated by including whether the platform restricts the workers ability to engage in business with the customers, independently of the platform, as a form of control indicative of worker status.[440]

[436] Fredman and Du Toit (n399).
[437] Subasinghe (n403).
[438] Countouris (n414).
[439] Ibid.
[440] Dubal (427).

The outcome is a test which looks similar to that of the Supreme Court in *Uber.* However, it takes account of, and removes, all the sources of confusion which currently serve to bar platform workers having certainty with regards to their protected status.

CONCLUSION

This thesis has sought to make the case for the introduction of platform-specific legislation, to clarify the protected status of platform workers. In doing so, it has also looked to take a novel approach to determining the form such legislation could take, by analysing different legislative proposals, namely California's AB5[441], and the EU's proposed Directive.[442] The proposal of the Directive was only released in December 2021, meaning that legislating on the issue of platform work, is an important and timely debate.

Chapter 1 has shown that platform work does not sit comfortably in any of the three categories of protected status, namely the employee, worker and independent contractor statuses. It is unique in nature, utilising online applications, centred around the completion of many small gigs and categorised by platforms as being flexible.[443] However, we have seen that platforms enforce many controls on platform workers in reality.[444] Platforms manipulate the contracts between themselves and platform workers to create a narrative that the relationship between them is one of two independent businesses, focussing on the supposed flexibility of platform work. Yet, the controls in place suggest that platforms workers are under contracts whereby they agree to perform services personally for the platform and, given the nature and extent of control present, do not have the opportunity to do as an independent business. Given that there are elements of the relationship which are indicative

[441] Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020) (AB5).
[442] European Commission Directive Proposal 2021/0414 (COD) on improving working conditions in platform work (2021).
[443] Miriam A Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 COMP LAB L & POL'Y J 577.
[444] Alan Bogg, 'Between Statute and Contract: Who is a Worker?' [2019] 135(Jul) L.Q.R 347.

of both worker status and independent contractor status, platform workers often fall into a legal no-mans-land, trapped between the two. This leaves them uncertain as to their protected status which, crucially, means they are not aware of their labour law rights.

The subsequent Chapters sough to make the case for the introduction of new, platform-specific legislation. The *Uber* litigation was examined in Chapter 2, to show that although the outcome was a good one for platform workers, the Supreme Court did not achieve any clarification of protected status for platform workers. Some believe the contrary to be true, with many more platform workers likely to be legally classified as workers following the Supreme Court's decision.[445] It is for this protective-based view that scholars believe the law should develop purposively[446], following the Supreme Court's approach. However, broadening the scope of rights is not the same as clarifying protected status. Several issues relating to clarity were raised as a result of the Court's combination of a contractual and statutory purposive approach in *Uber* to determine protected status. For example, the decision still meant that in order to access basic rights, platform workers would have to litigate[447] and it was unclear exactly how the purpose of the relevant statute was being determined.[448] Although providing a clear analysis of the methods of control used by Uber, the control test used by the Supreme Court was also not one capable of being applied consistently going forward. It gave no threshold for the level of control required to satisfy the requirement and used a non-exhaustive list of factors considered indicative of control. Moreover, the judgment hinted that a hierarchy of control may exist but did not define this any further than control over remuneration carry the most weight.[449] The control test applied, therefore, leaves several questions which prevent platform workers from being able to use the decision to determine, with certainty, their protected status.

After having shown that the judiciary had not, thus far, been able to clarify protected status – Chapter 3 went on to explain that it was not possible for them to do so, meaning platform

[445] Joe Atkinson and Hitesh Dhorajiwala, 'The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber*' (2021) 0(0) MLR 1.
[446] Guy Davidov, 'A Purposive Approach to Labour Law' (OUP 2016).
[447] Ruth Dukes, 'Regulating Gigs' (2020) 83(1) MLR 217, 221.
[448] Zoe Adams, 'One step Forward for Employment Status, Still Some way to Go: The Supreme Court's Decision in *Uber v* Aslam Under Scrutiny' (2021) 80(2) Cambridge Law Journal 221.
[449] *Uber BV v Aslam* UKSC 5 [94].

specific legislation is required. This is because the tests being applied do not reflect the reality or nature of platform work, creating loopholes which are being used by platforms to evade labour rights obligations. As well as the deficiencies noted above with regards to the control test, the personal service and mutuality requirements also cause confusion. It is argued that personal service is manipulated by platforms to avoid the allocation of worker rights to platform workers, through the use of substitution clauses.[450] Moreover, mutuality is a confused concept which, because of the tripartite relationship with exists between platforms, platform workers and end-users, causes confusion as to between whom the contractual obligations lie.[451] The current tests to determine the protected status, therefore, are unsuited to platform work and make it possible for platforms to twist the reality of the working relationship in order to avoid labour law rights obligations – meaning platform workers cannot be clear of their protected status. As these tests originate from the statutory definition of worker, we must enact new legislation which applies specifically to platform workers, it we are to clarify their protected status.

The final Chapter sought to determine the most effective form that any such legislation could take. In doing so we looked at two different models of statutory intervention. These were California Assemble Bill 5[452] and the EU's proposed Directive on improving working conditions in platform work.[453] To determine the form of the legislation to be proposed, we took each element of the tests for protected status from these two models, and asked whether applying them would rectify the issues caused by each stage of the current test to determine worker status. We saw that both began with a presumption of worker status, reversing the burden of proof onto platforms to prove that platform workers are not workers. This helps clarify the protected status of platform workers, without the need to litigate to be aware of their labour law rights.[454] For the scope of this presumption, we paired it with the EU's definition of platform work – to cover all those who have been the focus of this piece, such as Uber drivers

[450] Alan Bogg, 'Taken for a Ride: Workers in the Gig Economy' (2019) L.Q.R 135, 219-226.
[451] Giovanni Gaudio, 'Adapting Labour Law to Complex Organisational Settings of the Enterprise: Why Rethinking the Concept of the Employer is Not Enough' (2021) 50(2) I.L.J. 264.
[452] AB5 (n441)
[453] European Commission Directive Proposal 2021/0414 (COD) (n442).
[454] Ruth Dukes and Wolfgang Streek, 'Putting the Breaks on the Spread of Indecent Work (Social Europe, March 2021) < https://socialeurope.eu/putting-the-brakes-on-the-spread-of-indecent-work > accessed October 2021.

and Deliveroo riders.[455] We then suggested that being free from the control of the platform would be a means by which the presumption can be rebutted, as the quantifiable threshold suggested by AB5 brings clarity lacking in the Supreme Court's application of control in *Uber.* We also drew inspiration from the EU's proposed Directive to create an exhaustive list of controls considered – making it easier for platform workers to be clear themselves as to whether they are under the control of the platform. There are issues with the EU's suggested list[456], so it was suggested that the five controls found by the Supreme Court in *Uber* could provide a more suitable list to clarify protected status. Ultimately, the test recommended looks similar to the analysis of the Supreme Court in *Uber.* The protected status of platform workers becomes a question of control. The Supreme Court used this as a proxy for subordination and dependence, which in turn suggested a vulnerability of platform workers which was used to justify the allocation of worker rights.[457] However, the legislation proposed in this piece, takes significant steps to bring the clarity for those seeking to determine protected status – for example through the use of the presumption, a quantifiable control threshold, and an exhaustive list of controls considered.

The emergence of platform work has, ultimately, shown that the current legislation determining protected status, is out of date. Only be applying new legislation, specifically addressing the unique nature of platform work can we clarify their protected status, helping them to be aware of the rights available to them.

[455] Nicola Countouris (*Twitter*, 9 December 2021) < https://twitter.com/N_Countouris/status/1468923060875104268 > accessed 20 January 2021.
[456] Despoina Georgiou 'Some Thoughts on Potential Loopholes in the Personal Scope of the Commission's Proposed Directive on Platform Work' (Research Gate, December 2021) < https://www.researchgate.net/publication/356971811_Some_Thoughts_on_Potential_Loopholes_in_the_Personal_Scope_of_the_Commission%27s_Proposed_Directive_on_Platform_Work?enrichId=rgreq-8cdc1b237223796e9cf8e470c77301c1-XXX&enrichSource=Y292ZXJQYWdlOzM1Njk3MTgxMTtBUzoxMTM2NDgxMjI1NzExNjIzQDE2NDc5Njk2NDc3NDY%3D&el=1_x_3&_esc=publicationCoverPdf > accessed 10 January 2022.
[457] Alan Bogg and Michael Ford QC, 'The death of contract in determining employment status' (2021) LQR 392.

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